Supreme Court, U.S.
FILED

06-891 DEC 21 2006

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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MOON,
Petitioner

v

HARRISON PIPING SUPPLY,
MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND,
MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, and DR. ASIT RAY,
Respondents

PETITION FOR WRIT OF CERTIORARI

Marshall Lasser
MARSHALL LASSER PC
Attorney for Petitioner
P.O. Box 2579
Southfield MI 48037
248-647-7722

QUESTION PRESENTED

MAY A CIVIL RICO CASE BROUGHT BY A SINGLE PLAINTIFF BE DISMISSED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) ON THE GROUND HIS CLAIMS OF FRAUD FAILED TO PLEAD "CONTINUITY" OF A "PATTERN OF RACKETEERING," WHERE HE ALLEGED NOT ONLY FRAUD AGAINST HIMSELF BUT ALSO FRAUD AGAINST OTHERS, AND A THREAT OF CONTINUING FRAUD AGAINST HIMSELF AND OTHERS?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

PLAINTIFF

Timothy Moon

DEFENDANTS

Harrison Piping Supply, Michigan Tooling Association Workers Compensation Fund, Michigan Tooling Association Service Company, and Dr. Asit Ray

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TIMOTHY MOON, Plaintiff-Appellant v HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, and DR. ASIT RAY, Defendants-Appellees, *Opinion Decided and Filed Sept. 28, 2006*

TIMOTHY MOON, Plaintiff v HARRISON PIPING SUPPLY, a MI corporation, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, a MI corporation, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, a MI corporation, and DR. ASIT RAY, Defendants, *AMENDED OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(6)*, May 17, 2005

BASIS FOR JURISDICTION

1. The judgement of the Court of Appeals was entered September 28, 2006.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101

THE STATUTES INVOLVED IN THE CASE

Federal: The Racketeer Influenced Corrupt Organization Act (RICO) sections 18 U.S.C. 1961 and 18 U.S.C. 1962(c); 18 U.S.C. §1341 (relating to mail fraud), 18 U.S.C. §1343 (relating to wire fraud)

State: Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 385,

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et. seq. (RICO):

> May a civil RICO case brought by a single plaintiff be dismissed under federal rule of civil procedure Rule 12(B)(6) on the ground his claims of fraud failed to plead "continuity" of a "pattern of racketeering," where he alleged not only fraud against himself but also fraud against others, and a threat of continuing fraud against himself and others?

Mr. Moon brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action under 18 U.S.C. §1962(c), which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Section 1961 of RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)....."

This Court in *H. J. Inc. v Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), held that RICO requires plaintiff or prosecutor to show "continuity" to prove a "pattern of racketeering." Continuity is "both a closed- and open-ended concept, referring either to a closed period of

repeated conduct, or to past conduct that by its nature projects in the future with a threat of repetition." *Id*, 492 U.S. at 242, 109 S. Ct. at 2902. The Court provided a few guides but no test for determining whether closed-ended and open-ended continuity was present, stating, "The development of these concepts must await future cases..." *Id*, 492 US at 243ff, 109 S Ct at 2903, 106 L. Ed. 2d at This petition presents a "future case" suitable for development of the concepts of closed- and open-ended continuity.

Mr. Moon's pleadings alleged facts meeting *H. J. Inc.'s* requirements both for closed-ended and open-ended continuity. However, the trial court dismissed his complaint under Rule 12(b)(6), and the dismissal was affirmed by the Court of Appeals on the ground the complaint failed to allege either closed- or open-ended continuity. Plaintiff's petition should be granted because "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Supreme Court Rule 10(c))

Plaintiff pled allegations of fraud against others "based on information and belief, [which] are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." This invocation of Rule 11(b)(3) should have led the Court of Appeals to "relax" the rules of pleading fraud in a civil RICO case, under *Rotella v Wood*, 528 U.S. 549, 560, 120 S Ct 1075, 1083, 145 L Ed 2d 1047 (2000). The Court of Appeals did not follow *Rotella*. Again, "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Supreme Court Rule 10(c)). This petition presents a suitable case for explaining the degree to which civil RICO fraud pleadings are "relaxed" when Rule 11(b)(3) is invoked.

Facts. Timothy Moon was injured on the job while working for Harrison Piping Supply, entitling him to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA") from

Harrison and its insurer Michigan Tooling Association ("MTA"). The benefits consisted of weekly wage loss checks and payment of medical care for his injuries.

Mr. Moon alleged a pattern of racketeering by defendants to fraudulently deprive him of his benefits. This pattern used the mails in two ways:

> (1) MTA, acting in concert with Harrison, mailed three fraudulent Notices of Dispute to him and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of Mr. Moon's benefits. Upon mailing of each Notice of Dispute, MTA terminated benefits. MTA fraudulently terminated benefits three times over a period of 30 months. (After two of the three terminations, benefits were eventually reinstated.)
>
> (2) MTA, acting in concert with employer Harrison, obtained and mailed a false medical report from Dr. Asit Ray. MTA cited this false medical report in one of the Notices of Dispute as the basis for terminating benefits. MTA also submitted the false report to an Agency magistrate at a hearing held to determine whether Mr. Moon was disabled.

The decision of an Agency magistrate on the issue of a claimant's disability is res judicata only as to the claimant's condition on and before the date of the hearing. After the magistrate issues a decision, either the worker or the insurer may start another proceeding, asserting the claimant's disability status has changed, and another hearing will be held. Because the WDCA allows an Agency magistrate to hold hearings from time

to time to redetermine the issue of a claimant's disability, MTA might in the future commit other acts of fraud by obtaining and mailing other false reports from Dr. Ray or another physician.

Mr. Moon alleged defendants' acts involved mail fraud in violation of 18 U.S.C. §1341.[1] Plaintiff claimed defendants' fraudulent acts directly injured him because upon the mailing of the Notices of Dispute, MTA cut off his workers compensation benefits three times, each cut-off causing him loss of benefits and attorney expense to recover them.

Mr. Moon further alleged defendants defrauded other workers of their workers compensation benefits, and threatened continuing racketeering activity against employees of Harrison who will become entitled to Michigan workers compensation benefits. Plaintiff did not identify the workers whom defendants had allegedly defrauded, but invoked FRCP 11(b)(3) and pled "these allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery."

Defendants filed motions to dismiss under Rule 12(b)(6), asserting various grounds. The motions were granted on several grounds by the District Court, including that plaintiff's pleadings failed to allege a pattern of racketeering. The dismissal was affirmed by the Court of Appeals on the ground that plaintiff failed to allege a pattern of racketeering because his pleadings failed to demonstrate either closed-ended or open-ended continuity.

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1. Plaintiff's allegations and arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity plaintiff will use only the term "mail fraud."

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

Background and Procedural History

Timothy Moon alleged in his First Amended Complaint (Apx 100) that he was injured on the job while working for Harrison Piping Supply, entitling him to workers compensation benefits under Michigan's WDCA from Harrison and its insurer, MTA. Section 301(1) of the WDCA, MCL 418.301(1), provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (Apx 86)

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Workers Compensation Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Michigan Administrative Rule R408.33:

> Rule 3 (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant

to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 89.

§1962(c) of RICO provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Plaintiff brought suit pursuant to §1964(c) of RICO, which provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 78)

Plaintiff alleged defendants formed an "enterprise" which fraudulently deprived him of his workers compensation benefits through a series of "predicate acts" which formed a "pattern of racketeering activity" in violation of §1962(c). §1961(1) of RICO defines "racketeering activity" to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343.

Plaintiff's First Amended Complaint alleged in part:

> 6. One or more of [defendants] committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States

mails and by electronic communications in violation of 18 USC 1341 and 1343... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

7. On October 23, 2000, plaintiff suffered an injury while working for Harrison Piping Supply, which permanently disabled him from working in unrestricted manual labor.

8. Defendants paid workers compensation for that injury until they suspended benefits in October 2001, forcing plaintiff to undergo the expense of hiring an attorney . After litigating the case, they agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002.

9. After benefits were reinstated, the following events occurred, which demonstrated a pattern of racketeering conduct, consisting of two or more predicate acts:

a. In 2003, defendants had plaintiff examined by a doctor of their choice, Dr. Brent Smith.

b. Defendant's doctor, Smith, determined plaintiff could do a truck driving job limited to 8 hours work per day and no lifting over 40 lbs.

c. Defendants terminated workers compensation benefits on July 24, 2003, giving as the reason, "claimant fully released to job." This statement was contained within a Notice of Dispute mailed via the United States mailed by Cindy Jackson, an employee of the Fund, from Farmington Hills, MI, to plaintiff in

Taylor MI, on July 24, 2003. This statement was fraudulent because defendants knew that defendants' examiner, Dr. Smith had written that plaintiff was *not* fully released to his job at time of injury, and that plaintiff's treating physician, Dr. Alfredo Balarezo, had written that plaintiff was not fully released. (Plaintiff's job at time of injury required lifting over 40lbs and required him to drive over 8 hours per day from time to time.)

d. Plaintiff asked Harrison Piping to take him back to work within his restrictions. Ray Dido of Harrison refused to take plaintiff back to work.

e. On March 25, 2004, the date set for trial in plaintiff's workers compensation case, defendants reinstated plaintiff's workers compensation benefits.

f. On or even before the same date defendants reinstated plaintiff's workers compensation, defendants conspired to again terminate plaintiff's workers compensation benefits. On the same date defendants agreed to reinstate plaintiff's workers compensation benefits, defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray... The notice was part of a scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a "cut off" medical report that defendants could use to terminate plaintiff's benefits regardless of the true nature of his physical condition.

Dr. Ray was known to defendants... as a doctor who could be relied upon to write "cut off" reports in workers compensation cases; defendants and/or their attorney had relied upon him in the past to issue "cut off" reports. Defendants expressly or tacitly communicated to Dr. Ray that it wanted to obtain a "cut off" medical report, and Dr. Ray knew that he was not to perform an objective examination of plaintiff. On April 8, 2004, Dr. Ray examined plaintiff and wrote a report stating that plaintiff was no longer disabled due to a work related condition. Dr. Ray examined and reported on plaintiff not with the purpose of objectively determining whether plaintiff had a work related disability, but for the fraudulent purpose of providing the corporate defendants with a "cut off" report upon which they could rely in cutting off plaintiff's workers compensation benefits. This report was mailed via the US mail...

15. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act. The members of the enterprise engaged, in this case, in the pattern of racketeering described above in para. 9. Dr. Ray became part of the enterprise by his actions, described above. *On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.*

> 16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, *demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits.* [Apx 100, emphasis supplied]

Plaintiff also pled a state law claim not involved in this appeal.

Defendants filed motions to dismiss under Rule 12(b)(6), asserting various grounds. Before the motions were heard, plaintiff moved for leave to file a Second Amended Complaint. The proposed complaint described in greater detail the 2001 cut-off of benefits alleged in paragraph 8 of the First Amended Complaint, and for the first time specifically identified that cut-off as a mail fraud violation:

> 8. Defendants paid workers compensation for that injury until they suspended benefits on or about September 4, 2001. On Sept. 12, 2001, claim adjuster Cindy Jackson of defendant Michigan Tooling Association Service Company ("Service Company") sent by US mail to Timothy Moon at 8212 Margaret, Taylor, MI, a NOTICE OF DISPUTE which denied liability for workers compensation benefits to plaintiff and stated, "DATE OF INJURY DOES NOT FALL WITHIN OUR COVERAGE PERIOD OF 11-1-00 TO PRESENT. LIABILITY BELONGS TO AMERISURE PER 408.34(2)". This communication was fraudulent because the Service Company and the Michigan Tooling Association admitted on 10/21/02 they did insure plaintiff and other employees of

> Harrison Piping for workers compensation claims beginning on October 1, 2000, including plaintiff's injury of October 23, 2000. This fraudulent act, in violation of 18 USC 1341 and 1343, forced plaintiff to undergo the expense of hiring an attorney. After litigating the case, defendants agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002.... [Apx 90]

The motion for leave to file the Second Amended Complaint was granted by a magistrate judge, contingent upon the district judge denying the motions to dismiss. (Apx 77). This order was not appealed to the district judge.

Defendants' motions to dismiss were granted on several grounds by the District Court, including the ground that plaintiff's pleadings failed to allege a pattern of racketeering (Apx 20). The dismissal of the RICO cause of action was affirmed by the Court of Appeals (Apx 1) on the sole ground that plaintiff failed to allege a pattern of racketeering because his pleadings failed to demonstrate either closed-ended or open-ended continuity. Mr. Moon appeals the Rule 12(b)(6) dismissal of his case.

ARGUMENT

THIS COURT SHOULD CLARIFY THE CONCEPTS OF CLOSED-ENDED AND OPEN-ENDED CONTINUITY ANNOUNCED IN *H. J. INC.* AND THE CONCEPT OF "RELAXATION" OF FRAUD PLEADING ANNOUNCED IN *ROTELLA*.

A. OPEN-ENDED CONTINUITY

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects in the future with a threat of repetition." *H. J. Inc., supra, Id*, 492 U.S. at 242, 109 S. Ct. at 2902. After presenting these definitions, *H. J. Inc.* provided minimal guidance for determining whether open-ended continuity is present, "preferring to deal with this issue in the context of concrete factual situations presented for decision..." *Id*, 492 U.S. at 242, 109 S. Ct. at 2902. The Court of appeals misreading in this case of *H. J. Inc.* demonstrates the need for clarification of the concepts.

Concerning open-ended continuity, the Court did provide this guideline:

> "A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id*, 492 U.S. at 242, 109 S. Ct. At 2902.

Mr. Moon's allegations fit this pattern, yet the Court of Appeals held they did not. Mr. Moon described three predicate acts of mail fraud against him in 30 months, alleged defendants committed mail fraud against other workers compensation claimants, and *pled that defendants threatened more fraud against him and other*

claimants.

With regard to the fraud committed against him, the First Amended Complaint paragraph 9 described two predicate acts (involving the 2003 and 2004 cut offs of benefits), and the Second Amended Complaint described a third (involving the 2001 cut off).

With regard to past fraud against other workers compensation claimants, plaintiff alleged:

> ....On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. (paragraph 15 of the First Amended Complaint)

And:

> Defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray... The notice was part of a-scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a "cut off" medical report that defendants could use to terminate plaintiff's benefits regardless of the true nature of his physical condition. Dr. Ray was known to defendants... as a doctor who could be relied upon to write "cut off" reports in workers compensation cases; *defendants... had relied upon him in the past to issue "cut off" reports.* [Paragraph 9f, emphasis supplied]

With regard to the threat of future fraud against him and others at Harrison, plaintiff alleged in para. 16 of the First Amended Complaint:

> Defendants used the Postal Service and the wires for interstate

> communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits. [Emphasis supplied]

This combination of past fraud and threatened future fraud has "surely... established" the continuity element, at least at the pleading stage. Perhaps plaintiff will be unable to prove his allegations, but they may not be dismissed under Rule 12(b)(6) because a court is doubtful they can be proved. "[W]e may only affirm the dismissal of the complaint only if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H. J. Inc.*, 492 U.S. at 249, 109 S. Ct. at 2906.

Nor can the allegations be dismissed because plaintiff cannot yet supply details of the frauds committed against others. He has invoked Rule 11(b)(3), pleading allegations "based on information and belief, [which] are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." The constraints of pleading fraud are "relaxed" where this rule is invoked, *Rotella v Wood*, 528 U.S. 549, 560, 120 S Ct 1075, 1083, 145 L Ed 2d 1047 (2000).

In holding Mr. Moon failed to plead open-ended continuity, the Court of Appeals mistakenly said:

> All of the predicate acts .... were keyed to Defendants' single objective of depriving Moon of his benefits. No other schemes, purposes or injuries are alleged... (Apx 6)

The Court of Appeals ignored the allegations of paragraphs 9f, 15 and 16 of the First Amended Complaint that *other claimants* had been defrauded by false medical reports from Dr. Ray and by other predicate acts committed by Harrison and Michigan Tooling Association, *and that defendants threatened future fraud against plaintiff and others*. These allegations create open-ended continuity. At the very least, they

sufficiently pled continuity to withstand a motion brought under Rule 12(b)(6).[2]

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3. The Court of Appeals noted correctly that if Mr. Moon won his hearing before the Agency, defendants "could no longer suspend Moon's benefits through issuing Notices of Dispute, but would instead have to file a petition with the Bureau to stop their payments to Moon and prove that he is no longer entitled to them. Mich Admin. Code R. 408.40 (2006)." (Apx 6) However, the Court failed to note that defendants could still, under §385 of the WDCA (MCL 418.385), send Mr. Moon to Dr. Ray or another cut-off doctor and obtain a fraudulent report which it could then submit to the Agency prove he is no longer entitled to benefits.

After this RICO case was filed, the Agency magistrate denied plaintiff's claim for worker's compensation benefits, based on the MTA's cut off of benefits which relied on Dr. Ray's report. The magistrate adopted Dr. Ray's report and deposition testimony over that of plaintiff's doctors. However, plaintiff, like any other workers compensation claimant, was not permitted to discover whether an expert's report and testimony is the product of fraud involving expert and insurer. He cannot subpena records relating to that fraud. He cannot take depositions. He cannot gather or present proof showing how often the insurer has hired the expert, or how much the insurer has paid him, or whether the expert has always testified favorably for the insurer. General discovery is not available in a workers compensation case, and certainly not discovery of whether the examining doctor colluded with the insurer which hired him, *Stokes v DaimlerChrysler Corporation*, ___ Mich App ___ (Court of Appeals 268544, Oct. 26, 2006) ("the magistrate's authority is not derived from the broad discovery rules set forth in the Michigan Court Rules.")

This Court said in *H. J. Inc.* that "proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity...." 492 U.S. at 240, 109 S. Ct. At 2901, 106 L. Ed. 2d at 208. The Sixth Circuit's decision prevented plaintiff from proving defendants' involvement in multiple criminal schemes. The Court of Appeals prematurely dismissed plaintiff's complaint, before he could discover proof of continuity.

The Court of Appeal's dismissal violates *H. J. Inc's* sketchy guidelines for interpreting open-ended continuity. The error demonstrates the need to add more detail to that sketch. *The Court should use this case to clarify the concept of open-ended continuity.*

B. CLOSED-ENDED CONTINUITY

The Court of Appeals also mistakenly held that plaintiff failed to allege closed-end continuity:

> In any event, even if the racketeering activity lasted for two-and-a-half years, as Moon insists, facts establishing a closed period of continuity are still lacking. Moon has pleaded that the Defendants embarked upon a coordinated scheme to wrongfully terminate his workers' compensation benefits.... *No other schemes, purposes, or injuries are alleged, and there are no facts suggesting that the scheme would continue beyond the Defendants' accomplishing their goal of terminating Moon's benefits.* (Apx 5, emphasis supplied)

The Court of Appeals erred. Plaintiff alleged defendants defrauded *other* workers compensation claimants (First Amended Complaint paragraphs 9f, 15 and 16). Under *H. J. Inc.*, plaintiff pled closed-ended continuity.

Plaintiff also sought discovery of other predicate

acts committed against him. He alleged in the First Amended Complaint:

> 6. One or more of [defendants] committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

Under Rule 11(b)(3), and *Rotella*, supra, which provides for "relaxation" of Rule 9's fraud pleading requirements where Rule 11(b)(3) is invoked, dismissal for failure to allege continuity was premature.

Also, plaintiff cited in his appellate brief §385 of the WDCA, MCL 481.385, which allows Defendants to make him submit periodically to examination by a physician of the defendants' choice, thus "suggesting" that "the scheme would continue" even if he won at the workers compensation hearing which was pending before an Agency magistrate at the time the District Court dismissed the RICO case. *At any time* after the magistrate's decision, the defendants could have plaintiff examined by Dr. Ray or another "cut off" doctor, obtain a fraudulent report stating plaintiff was no longer disabled, and submit it to the magistrate as proof plaintiff was not entitled to benefits; the magistrate might be persuaded by the report and could then terminate his earlier award of benefits. Thus defendants' scheme could continue for ten or thirty years, or as long as Mr. Moon remained disabled, even if

the scheme applied only to Mr. Moon.[3]

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3. The WDCA provides that at any time during the disability, including after a magistrate's award of benefits to a claimant, a carrier or self-insured employer may send the claimant to a medical examination by a physician of its choice:

> MCL 418.385 Physical Examination of Employee.
>
> Sec. 385 After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or its carrer, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state...

If the doctor writes a report stating the claimant is no longer disabled, or disabled only because of a non-work-related condition, the carrier or self-insured employer may file a petition to stop benefits, pursuant to an administrative rule which provides

> R408.40 Stoppage, reduction or suspension of compensation.
>
> Rule 10. If compensation is being paid under an order or award of a magistrate or workers' compensation appellate commission, then compensation shall not be discontinued or reduced without a further order or award... A petition to stop compensation shall include... the following:
>
> ***
>
> (b) An affidavit stating that the employer has returned to gainful employment.... *or a signed statement from a physician stating the employee is able to return to employment.* [emphasis supplied]

A hearing is then held, and if the magistrate accepts the doctor's report, he will issue an order terminating benefits. If the magistrate rejects the doctor's report,

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v Imrex Co, Inc.*, 473 US 479 at 491 n. 10; 105 S Ct 3275 at 3283 n. 10; 87 L Ed 2d 346 at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima,* supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas,* 47 F3d 1280, 1297 (3rd Cir 1995).

The Sixth Circuit's rejection of Mr. Moon's suit conflicts with *Sedima's* encouragement of private actions, as well as with *H. J. Inc.'s* explication of the closed-ended "continuity" concept. *The Sixth Circuit's decision is not merely error, it demonstrates the need for the promised further development of the concept of closed-ended continuity.*

C. RELAXATION OF FRAUD PLEADING

Rotella, supra, held that Rule 9's requirement of pleading fraud with particularity should be "relaxed" where plaintiff invokes Rule 11(b)(3). In paragraph 15 of his First Amended Complaint, plaintiff invoked that rule:

> On information and belief, one or more

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the claimant continues to receive benefits, but the insurer or self-insured employer may again require the claimant to submit to examination, pursuant to MCL 418.385, and another petition to stop may be filed. The cycle may continue for the worker's lifetime.

> members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

This invocation of Rule 11(b)(3) should have been sufficient to prevent dismissal on the ground plaintiff failed to allege continuity. Although the flaw which the trial court and Court of Appeals found in plaintiff's complaints was not lack of particularity in describing dates and addresses of mailings, the lower courts did not abide by the principle implied by *Rotella - that courts should not be quick to dismiss RICO fraud pleadings where plaintiff requests discovery under Rule 11(b)(3) to gather proof sufficient to state a civil RICO claim for fraud.* The Sixth Circuit's dismissal reveals a need for this Court to state that principle plainly, not merely by implication.

Certainly, if the initial complaint is so barren of allegations that no reasonable discovery would lead to an actionable RICO case for fraud, dismissal under Rule 12(b)(6) is proper. But where, as here, plaintiff has alleged several predicate acts against himself and asserts defendants committed predicate acts against others, dismissal under that Rule is hasty, and in violation of the intent if not the exact words of both Rule 11(b)(3) and *Rotella*.

Had plaintiff been given the opportunity for discovery, he may have discovered frauds similar to those allegedly perpetrated against him, sufficient in quantity and time span to demonstrate closed- or open-ended continuity, or both.

Consonant with *Rotella* and Rule 11(b)(3), the Court should plainly state a rule that civil RICO fraud complaints should not be dismissed for failure to allege continuity where a plaintiff seeks discovery of frauds against others similar to those allegedly perpetrated

against him. Such a rule is consonant with the liberal construction of RICO mandated by Congress.

RELIEF REQUESTED

Timothy Moon requests this court to grant this petition for certiorari, or to summarily reverse the Court of Appeals and hold his First and Second Amended Complaints alleged civil RICO causes of action for mail and wire fraud against defendants, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.

_____

Marshall Lasser
Attorney for petitioner

Dec. 19, 2006

Supreme Court, U.S.
FILED

06-891 DEC 21 2006

OFFICE OF THE CLERK

NO _____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MOON,
Petitioner

v

HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, and DR. ASIT RAY,
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Marshall Lasser
MARSHALL LASSER PC
Attorney for Petitioner
P.O. Box 2579
Southfield MI 48037
248-647-7722

APPENDIX

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0365p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY MOON,

Plaintiff-Appellant,

v. No. 05-1808

HARRISON PIPING SUPPLY; MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND; ASIT K. RAY; MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 04-71882-Paul D. Borman, District Judge.

Argued: June 8, 2006

Decided and Filed: September 28, 2006

Before: MOORE, COLE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Marshall D. Lasser, LAW OFFICE OF

MARSHALL LASSER, Southfield, Michigan, for Appellant. Thomas J. Laginess, CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., Livonia, Michigan, Hal 0. Carroll, VANDEVEER GARZIA, P.C., Troy, Michigan, Dale A. Robinson, RUTLEDGE MANION RABAUT TERRY & THOMAS P.C., Detroit, Michigan, for Appellees. ON BRIEF: Marshall D. Lasser, LAW OFFICE OF MARSHALL LASSER, Southfield, Michigan, for Appellant. Thomas J. Laginess, Ronald Acho, CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., Livonia, Michigan, Hal 0. Carroll, VANDEVEER GARZIA, P.C., Troy, Michigan, Dale A. Robinson, RUTLEDGE MANION RABAUT TERRY & THOMAS P.C., Detroit, Michigan, C.F. Boyle, Jr., LAW OFFICE OF C.F. BOYLE, JR., Chicago, Illinois, for Appellees.

COLE, J., delivered the opinion of the court, in which CLAY, J., joined. MOORE, J. (pp. 9-10), delivered a separate concurring opinion.

OPINION

R. GUY COLE, JR., Circuit Judge. Timothy Moon filed suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, as well as state tort law, alleging that his employer colluded with an insurance provider, an insurance adjuster, and a physician, to deny him workers' compensation benefits. The district court dismissed Moon's suit for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, because the suit was "reverse-preempted" under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Because Moon failed sufficiently to allege a pattern of racketeering activity for purposes of RICO, we AFFIRM the district court's judgment with respect to Moon's RICO claim. However, because deciding Moon's state-law claim was unnecessary, we REVERSE the district court's exercise of pendent jurisdiction, and REMAND with instructions to dismiss those claims without prejudice.

I. BACKGROUND

According to his First Amended Complaint (the "Complaint"), Timothy Moon was an employee of Harrison Piping Supply ("Harrison"), who was injured at work on October 23, 2000. Although he initially received workers' compensation benefits, Moon alleges that Harrison colluded with the Michigan Tooling Association Workers' Compensation Fund (the "Fund"), the Michigan Tooling Association Service Company (the "Service Company"), and Dr. Asit Ray to terminate those benefits. Moon named as defendants: (1) Harrison, his employer; (2) the Fund, which is Harrison's insurer; (3) the Service Company, which was the Fund's adjuster; and (4) Ray, an independent physician.

Moon alleges that the Defendants collectively formed an "enterprise" for purposes of RICO and engaged in a pattern of racketeering in the form of mail fraud and witness-tampering. Specifically, Moon claims that the Fund sent him a Notice of Dispute (the "Notice") via United States mail on July 24, 2003, which stated that Moon was capable of fully resuming his job responsibilities even though Defendants knew that examining doctors had determined that Moon was still disabled. The Notice terminated Moon's benefits.

After receiving the Notice, Moon brought a workers' compensation claim before the Michigan Workers' Disability Compensation Bureau (the "Bureau"). According to Moon, the Defendants reinstated his benefits on the eve of his hearing before the Bureau. On the same day, March 25, 2004, the Fund and the Service Company sent notice to Moon that he was to be examined by Dr. Ray. According to Moon, the other Defendants gave Dr. Ray express or tacit instructions to issue a "cut-off' report, i.e., a medical report that could form the basis for terminating Moon's benefits. Dr. Ray, who Moon claims has a reputation for rendering medical opinions supporting rejection of claimants' benefits, examined Moon on April 8, 2004, and issued an allegedly

fraudulent report opining that Moon was no longer disabled. The report was mailed to various persons and entities, including the Bureau. Finally, on April 16, 2004, the Fund mailed a second Notice of Dispute ghe "Second Notice"), which, according to Moon, falsely claimed that he was no longer disabled.[1]

Moon filed a RICO claim in district court, as well as a claim for intentional infliction of emotional distress ("IIED") under Michigan common law. The Defendants filed a motion to dismiss for, inter alia, failure to state a claim upon which relief could be granted under Rule 12(b)(6). The district court granted the Defendants' motion in an Amended Opinion and Order, dismissing with prejudice Moon's RICO and IIED claims. This timely appeal followed.

II. STANDARD OF REVIEW

In assessing a motion to dismiss for failure to state a claim under Rule 12(b)(6), we "treat[] all well-pleaded allegations in the complaint as true." *Kostrzewa v. City of Troy,* 247 F.3d 633, 638 (6th Cir. 2001). "Dismissal is proper only 'if it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claims that would entitle [him] to relief'" *Id.* (quoting *Performance Contracting, Inc. v. Seaboard Sur. Co.,* 163 F.3d 366, 369 (6th Cir. 1998)).

1In support of his witness-tampering claim, Moon states only that "Defendants' actions violated 18 U.S.C. § I 5 12." He adds that "[t]his allegation is based in part on information and belief, and are [sic] likely to have evidentiary support after reasonable opportunity for investigation and discovery."

Moreover, we construe the complaint in the light most favorable to the non-moving party. *Columbia Natural Res., Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995). A complaint will survive a motion to dismiss if it "contain[s] either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." *Performance Contracting, Inc.,* 163 F.3d at 369; *see also Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (Rule 12(b)(6) dismissal improper unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"). We review a district court's Rule 12(b)(6) dismissal de novo. *Gao v. Jenifer,* 185 F.3d 548, 552 (6th Cir. 1999).

III. DISCUSSION

A. Moon's RICO Claims

Moon asserts a claim under RICO, a federal statute that affords a civil remedy to an individual who is injured by virtue of certain types of unlawful activity. RICO provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Thus, to state a RICO claim, Moon must plead the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 496 (1985). Because we conclude that the Complaint lacks facts establishing a "pattern of racketeering activity," and thus fails to state a RICO claim, we do not address any of the

other RICO elements.

1. *Moon Has Failed To Allege Adequately A "Pattern Of Racketeering Activity"*

(a) Predicate Acts

To establish a RICO violation under §1962(c), a plaintiff must allege that the RICO enterprise engaged in a "pattern of racketeering activity" consisting of at least two predicate acts of racketeering activity occurring within a ten-year period. 18 U.S.C. § 1961(5). The alleged predicate acts may consist of offenses "which are indictable" under any of a number of federal statutes, including the mail (18 U.S.C. § 1341) and wire fraud statutes (18 U.S.C. § 1343). 18 U.S.C. § 1961(1).

Here, the district court concluded that Moon pleaded five predicate acts of racketeering activity with the requisite particularity. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (consistent with Rule 9(b), RICO plaintiffs must allege "the time, place and contents of the misrepresentations"). These alleged acts include: (1) the Fund's July 24, 2003 mailing to Moon of the Notice terminating his benefits on the fraudulent grounds that Moon was capable of resuming his job responsibilities; (2) the Fund's March 25, 2004 mailing of a Notice of Examination to be performed by Dr. Ray, which examination was part of Defendants' scheme to fraudulently deprive Moon of his benefits; (3) Dr. Ray's mailing, between April 8, 2004 and April 26, 2004, of his medical report, which fraudulently opined that Moon was no longer disabled; (4) Defendants' agent's (attorney Felker) April 26, 2004 mailing of Dr. Ray's fraudulent medical report to Moon's counsel; and (5) the Fund's April 16, 2004 mailing to Moon of the Second Notice terminating Moon's benefits, which again fraudulently stated that Moon was not disabled.

The district court correctly concluded that Moon adequately pleaded a minimum of two predicate acts.[2] Although necessary to sustain a RICO claim, the pleading of two predicate acts may not be sufficient because § 1961(5) "assumes that there is something to a RICO pattern *beyond* the number of predicate acts involved." *HI, Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 238 (1989). In *Hi*, the Supreme Court held that "the term pattern itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern." *Id.* at 239 (internal citations omitted). "Continuity and relationship constitute two analytically distinct prongs of the pattern requirement.*Vild v. Visconsi*, 956 F.2d 560, 566 (6th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992).

(b) Relatedness

Moon has satisfied the "relatedness" requirement because he has alleged predicate acts that have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Hi, Inc.*, 492 U.S. at 240. The predicate acts pleaded in the Complaint had the same purpose of depriving Moon of his benefits, the same result in that Moon periodically lost his benefits, the same participants in Harrison and the Fund, the same victim in Moon, and the same method of commission in mail fraud.

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[2]We do not reach the issue, decided by the district court, of whether a RICO plaintiff must plead at least two predicate acts against *each* defendant alleged to have participated in a racketeering enterprise. Since the parties do not challenge this portion of the district court's order, and since we hold that Moon's RICO pleading fails on other grounds, we decline to express an opinion on this subject.

(c) Continuity

In addition to "relatedness," the predicate acts pleaded must have sufficient "continuity." "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Whether a pattern of racketeering activity satisfies the continuity requirement depends on the particular facts of each case. *Id.* at 242. Continuity may be established at the pleading stage by alleging facts of either closed- or open-ended racketeering activity.

A closed period of continuity may be demonstrated "by proving a series of related predicates extending over a substantial period of time." *Id.* at 242. Here, the predicate acts set forth in the Complaint cover a nine-month period (from July 2003 to April 2004). Although there are no rigid rules regarding what amounts to "a substantial period of time," racketeering activity lasting only "a few weeks or months and threatening no future criminal conduct" is insufficient. *Id.* at 242; see also *Vemco, Inc. v. Camardella,* 23 F.3d 129, 134 (6th Cir. 1994), *cert. denied,* 513 U.S. 1017 (1994) (predicate acts over 17 months did not satisfy the closed period analysis); *Vild,* 956 F.2d at 569 (predicate acts over six or seven months not sufficient under closed-period analysis).

Moon argues that the district court erred by failing to consider the allegations in his Second Amended Complaint when it concluded that he failed to allege a closed period of racketeering activity. The Second Amended Complaint is virtually identical to the Complaint (i.e., the First Amended Complaint) except that the former pleads that Moon's benefits were first unlawfully terminated in September 2001 and that this constituted the first predicate act in the Defendants' racketeering scheme. Had the district court

taken into account the additional facts pleaded in his Second Amended Complaint, contends Moon, the pattern of racketeering would have extended for two-and-a-half years, rather than nine months, and therefore would have satisfied the closed period requirement.

Moon is mistaken. The Second Amended Complaint was not properly before the district court, nor is it before this Court. The magistrate judge granted Moon's motion to file a Second Amended Complaint subject to the district judge denying the motions to dismiss, which the district judge did not do. Moon did not appeal the order of the magistrate judge to the district judge. Even though Moon's notice of appeal to this Court includes the magistrate judge's order, this Court lacks jurisdiction to review that order where the magistrate judge did not have plenary jurisdiction over Moon's case (the district judge merely referred to the magistrate judge Moon's motion for leave ts file his Second Amended Complaint) and Moon failed to seek review before the district judge first.[3] *See McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 471 (6th Cir. 2006) (declining to entertain appeal of magistrate judge's order denying a motion for a default judgment where the magistrate did not exercise plenary jurisdiction and the appellant did not appeal to the district judge).

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[3]28 U.S.C. § 636(c)(1) provides that "[u]pon the consent of the parties, a . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court . . ." Orders from magistrate judges who exercise plenary jurisdiction over a case are directly appealable to this Court. *See In re Bell & Beckwith*, 838 F.2d 844, 848 n.5 (6th Cir. 1988).

In any event, even if the racketeering activity lasted for two-and-a-half years, as Moon insists, facts establishing a closed period of continuity are still lacking. Moon has pleaded that the Defendants embarked upon a coordinated scheme to wrongfully terminate his workers' compensation benefits. All of the predicate acts ---- the mailing of the Notice and Second Notice cutting off his benefits and the mailing of Dr. Ray's fraudulent medical report—werekeyed to Defendants' single objective of depriving Moon of his benefits. No other schemes, purposes, or injuries are alleged, and there are no facts suggesting that the scheme would continue beyond the Defendants accomplishing their goal of terminating Moon's benefits. In circumstances such as these, the purported racketeering activity does not bear the markings of the "long-term criminal conduct" about which "Congress was concerned" when it enacted RICO. *ICJ., Inc.*, 492 U.S. at 242.

This Court's prior decisions compel the conclusion that Moon has not pleaded a closed-ended period of continuity. For instance, in *Vemco,* the parties entered into a contract under which the defendant agreed to build a "paint finishing system" in the new facility of the plaintiff car-parts manufacturer. *Id.* at 131. Displeased with the defendant's repeated demands for payment beyond that specified in the contract and defendant's performance under the contract, the plaintiff brought suit alleging predicate acts of fraud and extortion under RICO. *Id.* at 131-32. This Court held that a single scheme emanating from a dispute over an ordinary construction contract did not possess the requisite RICO continuity:

> Vemco has alleged a single fraudulent scheme by Flakt to misrepresent a guaranteed price in a building contract, and later to extort a higher price from Vemco. The total scheme, from the time of contract negotiations until the last threat alleged, lasted only seventeen months. The goal of the

> 'single criminal episode,' as the district court accurately characterized it, was to get Vemco to pay the cost of *one* paint system. [T] There are no facts pleaded suggesting anything but that once Flakt received the money it was requesting in the billing statements, its scheme would be over, and it would end its association with Vemco.

Vemco, 23 F.3d at 134-35.

Similarly, in *Thompson v. Paasche,* 950 F.2d 306 (6th Cir. 1991), the plaintiff landowners asserted RICO claims against the defendant seller on the grounds that the seller fraudulently represented that the purpose of his reservation of oil and gas rights as part of the terms of the sales was to ensure that the land remained unspoiled. *Id.* at 309. In fact, claimed the plaintiffs, the seller had arranged to lease the oil and gas rights to a third party who would undertake drilling. *Id.* at 30910. This Court reversed the RICO verdict for the plaintiffs, concluding that the alleged RICO scheme ended once the defendant had sold all of his lots to the plaintiffs, and therefore it was "insufficiently protracted to qualify as a RICO violation." *Id.* at 311; *see also Efron v. Embassy Suites (Puerto Rico), Inc.,* 223 F.3d 12, 19 (1st Cir. 2000), *cert. denied,* 532 U.S. 905 (2001) (where the plaintiff alleged a pattern of racketeering acts focused on coercing him into relinquishing his ownership interest in a real estate development project, the court characterized the alleged racketeering activities as "finite in nature" and occurring over a "relatively modest period of time," thus foreclosing a finding of closed-period continuity); *Edmondson & Gallagher v. Alban Towers Tenants Assoc.,* 48 F.3d 1260, 1265 (D.C. Cir. 1995) ("We think that the combination of these factors (single scheme, single injury, and few victims) makes it virtually impossible for plaintiffs to state a RICO claim.").

As in the foregoing cases, Moon's allegations center around a single RICO scheme with a single object stemming from a dispute about whether Moon is impaired by a workplace

disability entitling him to benefits. Even assuming a period of two-and-a-half years of racketeering activity, these allegations do not give rise to closed-ended continuity.

Moon's allegations also do not give rise to a finding of open-ended continuity. This inquiry turns on whether the plaintiff has pleaded facts suggesting the threat of continued racketeering activities projecting into the future. In H.J., the Supreme Court held that open-ended continuity could be pleaded through facts showing "a distinct threat of long-term racketeering activity," or by showing "that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Hi., Inc.*, 492 U.S. at 242.

Here, Moon argues that open-ended continuity exists because there is nothing to stop the Defendants from persisting in their cycle of fraudulently terminating his benefits, restoring them, and then fraudulently terminating them again. The district court was not persuaded, finding that there is no risk of ongoing racketeering activity where Moon petitioned the Bureau for a resolution of his dispute with Defendants. We agree. A final decision of the Bureau (once all appellate options have been exhausted) is binding on the parties and, if favorable to Moon, would prevent the Defendants from withdrawing benefits in the absence of further action by the Bureau. *See* Mich. Comp. Laws Serv. §§ 418.847 & 418.851 (2006). In other words, the Defendants could no longer suspend Moon's benefits through issuing Notices of Dispute, but would instead have to file a petition with the Bureau to stop their payments to Moon and prove that he is no longer entitled to them. Mich. Admin. Code R. 408.40 (2006).

We do not hold that a RICO action for fraudulent termination of workers' compensation benefits could never occur alongside a state administrative proceeding before the Bureau, but merely that under the fact-specific continuity inquiry, Moon has not alleged facts sufficient to establish a

pattern of racketeering activity.

Finally, Moon has not pleaded any allegations to the effect that the fraudulent termination of workers' compensation benefits is Defendants' "regular way of doing business." *Inc.*, 492 U.S. at 242; *see also Vild*, 956 F.2d at 569 (plaintiff who asserted RICO violations stemming from fraudulent representations and extortion in connection with a marketing agreement did not allege facts demonstrating that the "conduct directed toward him is a normal way of doing business for defendants"). True, Moon pleads that "Dr. Ray was known to defendants, through their attorney Thaddeus Felker, as a doctor who could be relied upon to write 'cut off' reports in workers compensation cases; defendants and/or their attorney had relied upon him in the past to issue 'cut off' reports." Moon also pleads that "[o]n information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers' compensation benefits." These allegations do not reasonably support the notion that the alleged fraud of which Moon complains is Defendants' *regular* way of doing business. "Regular" means "usual; normal; customary." *Random House Unabridged Dictionary* 1624 (2d ed. 1993). Moon's allegations regarding open-ended continuity amount to the following: (1) Moon—the only plaintiff in this case—was denied workers' compensation benefits as a result of Defendants' scheme to use Dr. Ray to fraudulently deny benefits; (2) Defendants had used Dr. Ray for this purpose in the past; and (3) at some point, Defendants treated some other people similarly to Moon. Moon does not allege the sort of longstanding relationship that would give rise to a threat of continued racketeering activity. Drawing all reasonable inferences in Moon's favor may lead us to conclude that several instances of similar conduct have occurred, but they do not support a systematic threat of ongoing fraud. In short, the leap from Moon's allegations to the conclusion that Defendants customarily bilked employees out of workers' compensation benefits is too great, even drawing all reasonable inferences in favor of Moon.

For the reasons described above, we AFFIRM the district court's judgment dismissing Moon's RICO claims under Rule 12(b)(6).

B. Moon's IIED Claim

Having dismissed Moon's RICO claim, the district court proceeded to analyze whether Moon stated a claim for intentional infliction of emotional distress under Michigan common law. We review a district court's decision to exercise pendent jurisdiction for abuse of discretion, *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1983), meaning that this Court will not reverse unless the district court "relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *United States v. Chambers*, 441 F.3d 438, 446 (6th Cir. 2006) (internal citation omitted).

As the district court recognized, a federal court that has dismissed a plaintiff's federal-law claims should not ordinarily reach the plaintiff's state-law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996); *Gaily*.

[4]Although it is not germane to our disposition of Moon's appeal, the magistrate judge that presided over Moon's Bureau petition issued an opinion granting Moon a closed award of benefits entitling him to compensation only for the period of Oct. 24, 2000 through April 7, 2004. On April 24, 2006, during the pendency of this appeal, Michigan's Workers' Compensation Appellate Commission affirmed the magistrate judge's decision.

Fed. Deposit Ins. Corp., 814 F.2d 311, 319 (6th Cir. 1987); *Landefeld*, 994 F.2d at 1182. Residual jurisdiction should be exercised only in cases where the "interests of judicial economy and the avoidance of multiplicity of litigation" outweigh our concern over "needlessly deciding state law issues." *Landefeld*, 994 F.2d at 1182 (quoting *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir. 1991)).

Contrary to the analysis of the district court, this is not such a case. Moon's IIED claim has no bearing on his RICO claim. Moreover, although we decline to address whether Moon's RICO claim is precluded by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), we disagree with the district court that resolution of Moon's TIED claim is necessary to resolve that issue. Meanwhile, Moon's IIED claim implicates complex aspects of Michigan law. Michigan courts of appeal have handled such claims differently over the years, *compare Broadus v. Ferndale Fastener Div.*, 269 N.W.2d 689, 693 (Mich. Ct. App. 1978), *with Lisecki v. Taco Bell Rests., Inc.*, 389 N.W.2d 173, 176 (Mich. Ct. App. 1986), and the Michigan Supreme Court has never formally recognized TIED as a cause of action. *See Roberts v. Auto Owners, Inc.*, 374 N.W.2d 905, 913 (Mich. 1985) (Williams, C.J., concurring). Moon's is clearly the ordinary case, where the exercise of pendent jurisdiction is improper.

Iv. CONCLUSION

For the reasons described above, we AFFIRM the district court's dismissal of Moon's RICO claim for failure to state a claim upon which relief can be granted under Rule 12(b)(6). We REVERSE the district court's dismissal of Moon's claim for intentional infliction of emotional distress, and REMAND with instructions to dismiss that claim without prejudice.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring. The Supreme Court has indicated two ways a RICO plaintiff may prove (or, as is the case here, allege) a "pattern of racketeering activity" by showing open-ended continuity. First, "[a] RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Hi, Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). Alternatively, "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* I wholly agree with the majority's analysis of the "regular way of doing business" method of alleging open-ended continuity. Further, I agree with the majority that Moon fails to allege a "distinct threat of long-term racketeering activity." However, I offer different reasons for this conclusion.

As an initial matter, in determining whether Moon has alleged a threat of long-term racketeering activity, I do not believe we should consider events that transpired after the alleged racketeering acts ended. In *United States v. Busacca*, 936 F.2d 232 (6th Cir. 1991), we noted that "the threat of continuity must be viewed at the time the racketeering activity occurred." *Id.* at 238. *See also Blue Cross & Blue Shield of Mich. v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989) (concluding that racketeering activity was open-ended because "if he had not been caught, there is no reason to believe [the defendant] would not still be submitting false claims"). Thus, the question we must answer is whether Moon has pleaded sufficient facts to conclude that, on the date of the last alleged racketeering act, there was a distinct threat of long-term racketeering activity.

Moon's First Amended Complaint alleges the following:

- Moon's benefits were terminated on July 24, 2003, J.A. at 10 (First Am. Compl. II 9c);
- On March 25, 2004, his benefits were reinstated, J.A. at 11 (First Am. Compl. !I 9e);
- That same day, the Fund and the Service Company sent him a notice of examination, requiring him to be examined by Dr. Ray, J.A. at 11 ((First Am. Compl. 119f);
- The defendants previously had relied on Dr. Ray to write cut-off reports, *id.* ;[1]
- On April 8, 2004, Dr. Ray examined Moon and wrote (and subsequently mailed) a fraudulent report concluding that Moon was not disabled, *id.;*
- On April 16, 2004, an employee of the Fund mailed Moon a notice of dispute claiming that he had no work-related disability, J.A. at 12 (First Am. Compl. 1110).

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[1]Moon offers no direct allegation, however, that these prior reports were necessarily fraudulent.

Although nothing in these allegations indicates that, as of April 2004, the alleged racketeering activity would immediately cease, nothing indicates the type of "distinct threat of long term racketeering activity" the Supreme Court referred to in *H.J.* In explaining what might constitute such a distinct threat, the Supreme Court offered the example of a thug's extorting money from storekeepers and "telling his victims he would be reappearing each month to collect" additional payments. *H.I,* 492 U.S. at 242. This example led us to state that a plaintiff seeking to prove open-ended continuity in this manner must show acts that "*by their nature* 'involve a distinct threat of long-term racketeering activity.'" *Vild v. Visconsi,* 956 F.2d 560, 569 (6th Cir. 1992) (emphasis added). *See also id.* ("Similarly, the plaintiff cannot fulfill the open-ended formulations of the continuity test because he has not alleged facts which, by their nature, demonstrate only a threat of indefinite improper activity . . . ."). Because the nature of the acts Moon alleges does not indicate a distinct threat of long-term racketeering activity, his First Amended Complaint does not sufficiently allege a RICO "pattern."

For these reasons, I respectfully concur.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY MOON,

Plaintiff,

Case Number: 04-CV-71882

v.

JUDGE PAUL D. BORMAN

UNITED STATES DISTRICT COURT

HARRISON PIPING SUPPLY, a MI corporation; MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, a MI corporation; MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, a MI corporation; and DR. ASIT RAY,

Defendants.

AMENDED OPINION May 17, 2005

AMENDED OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(6)'

Now before the Court are Defendants[1] motions to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, to stay proceedings. The Court heard oral argument on February

[1]The opinion is amended solely with regard to the discussion of "detrimental reliance" in the context of the

7, 2005. Having considered the entire record, and for the reasons that follow, the Court:

1) DISMISSES Plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, because they fail to state claims for which relief may be granted, and because Michigan's Workers' Disability Compensation Act, M.C.L.A 418.131, *et seq.*, reverse-preempts those claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b); and

DISMISSES Plaintiff's state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

I. FACTS

At all times relevant to the instant action, Timothy Moon ("Plaintiff") was an employee of Harrison Piping Supply ("Harrison"). (1St Am. Compl. at ¶ 4.) The Michigan Tooling Association Workers Compensation Fund ("the Fund") and the Michigan Tooling Association Service Company ("the Service") insured Harrison for workers-compensation claims and adjusted such claims for Harrison, respectively. (Id.) Dr. Asit Ray ("Ray") examined Plaintiff, on behalf of the other Defendants, concerning his entitlement to workers compensation benefits. *(Id.* at ¶ 9 (0)

RICO claims, beginning on page 24.

On June 7, 2004, Plaintiff filed a First Amended Complaint against Harrison, the Fund, the Service, and Ray (collectively "Defendants"), alleging that each Defendant engaged in a fraudulent enterprise to deny Plaintiff of his workers' compensation benefits in violation of the Racketeer Influenced and Corrupt Organizations Act ("the RICO Act"), 18 U.S.C. § 1961, *et seq.*, and alleging that the corporate Defendants intentionally inflicted emotional distress upon Plaintiff in violation of Michigan law. *(Id.* at TT 7-19.)

On July 20, 2004, Harrison filed the instant motion to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) or to stay proceedings. The stay relates to the fact that Plaintiff has an on-going workers' compensation claim proceeding. The Service, the Fund, and Ray concur in this motion to the extent that Harrison's arguments would equally apply to Plaintiffs claims against them. (Ray Mot. at 2.) On August 13, 2004, Ray filed the instant motion to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) or to stay proceedings. Much of that motion merely repeats the arguments that Harrison raises in its motion to dismiss. On September 1, 2004, the Fund filed the instant motion to dismiss Plaintiff's First Amended Complaint. Both the Service, as an agent of the Fund, and Harrison concur in this motion to the extent that the Fund's arguments equally apply to Plaintiff's claims against them. On November 16, 2004, the Service filed the instant motion to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6). Harrison concurs in this motion to the extent that the challenges that it raises equally apply to Plaintiff's claims against Harrison.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise as a defense to a claim for relief in a pleading the opposing party's failure to state a claim upon which

relief can be granted. Rule 12(b)(6) is designed to test whether, as a matter of law, a plaintiff is entitled to legal relief. *Nishiyama v. Dickson County,* 814 F.2d 277, 279 (6th Cir. 1987). Before dismissing a complaint for failure to state a claim upon which relief can be granted, a court must conclude "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Carver v. Bunch,* 946 F.2d 451, 452 (6th Cir. 1991).

To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under,, some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir. 1988). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept well-pleaded facts as true. *Columbia Natural Resources Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995). Thus, a court may not grant a Rule 12(b)(6) motion based upon its disbelief of a complaint's factual allegations. *Id.* A court, however, need not accept as true conclusions of law or unwarranted factual inferences. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987).

Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." *Compare Begala v. PNC Bank, Ohio, Nat. Ass 'n,* 214 F.3d 776, 781 (6th Cir. 2000) (holding that RICO pleadings are to be liberally construed).

Rule 12(b) provides:

> If, on a motion asserting the defense . . . [of] failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall

be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A. RICO Claims

The Court will proceed to discuss the following issues related to Plaintiff's RICO claims:

1) whether the primary-jurisdiction doctrine mandates a stay of Plaintiff's RICO claims;

2) whether the *Burford* doctrine mandates a stay of Plaintiff's RICO claims;

3) whether the complaint pleads a predicate act of witness tampering;

4) whether the complaint pleads predicate acts of mail/wire fraud with the necessary particularity;

5) whether the complaint pleads the requisite pattern of racketeering activity as to each Defendant;

6) whether the complaint pleads detrimental reliance to establish the necessary causation;

7) whether the complaint pleads the requisite pattern of racketeering activity;

8) whether the complaint pleads the necessary impact on interstate or foreign commerce;

9) whether the complaint pleads a distinct

criminal enterprise;

10) whether the McCarran-Ferguson Act reverse-preempts Plaintiff's RICO claims; and

11) whether the Labor Management Relations Act preempts Plaintiff's RICO claims.

1. The Primary-Jurisdiction Doctrine

In their motions to dismiss, Defendants contend that the primary-jurisdiction doctrine applies to Plaintiff's RICO claims. Plaintiff has filed a claim for workers' compensation benefits before the Workers' Disability Compensation Bureau ("the WDCB"), and is awaiting a final determination on that claim.[2]

The doctrine of primary jurisdiction's aim is to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pac. R. R. Co.*, 352 U.S. 59, 63 (1956). Specifying when the doctrine of primary jurisdiction is applicable, the Supreme Court has held:

. . . . 'Primary jurisdiction' applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of a claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case[,] a judicial process is suspended pending referral of such issues to the administrative body for its views.

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[2]On March 4, 2005, Magistrate Michael J. Barney of the WDCB issued an opinion finding, among other things, that Plaintiff's suffered closed periods of work-related disability stemming from work-related injuries on October 23, 2000, and October 19, 2001, and that the last of those periods of work-related disability ended on April 7, 2004, the day before Ray examined Plaintiff. This opinion, however, does *Id.* at 63-64. Thus, the primary-jurisdiction doctrine applies where: 1) the Court has original jurisdiction over

the claim before it; 2) the adjudication of that claim requires the resolution of certain underlying issues; and 3) a regulatory scheme commits the resolution of those issues to an administrative agency's special competence. In deciding whether the primary-jurisdiction doctrine applies in any given case, the court must determine whether the application of that doctrine in the particular case would serve the following twin rationales underlying that doctrine: 1) uniformity in questions of an administrative nature; and 2) the expert and specialized knowledge of the relevant agency to the issue in question. *Id.* at 64.

The threshold requirements for the applicability of the primary-jurisdiction doctrine are met here. First, despite Defendants' arguments to the contrary, the Court clearly has jurisdiction over Plaintiff's RICO claims.[3] Second, the adjudication of Plaintiffs RICO claims–i.e. that Defendants engaged in a RICO enterprise fraudulently to

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not yet constitute a final decision by the WDCB as Plaintiff has filed a claim for review with the Workers' Compensation Appellate Commission, pursuant to M.C.L.A. 418.851. Moreover, M.C.L.A. 418.861 affords, in certain circumstances, the Michigan Court of Appeals and the Michigan Supreme Court the "power to review questions of law involved in any final order of the board." As such, the workers' compensation issue will not be resolved in the near future.

[3]The Fund and the Service argue that, because Plaintiff's RICO claims hinge upon his entitlement to workers' compensation benefits, the WDCB, rather that this Court, possesses the subject-matter jurisdiction necessary to make that determination. (Fund's Mot. Br. at 6; Service Br. at 6.) In support, they rely upon Michigan law bestowing upon the WDCB exclusive jurisdiction over workers' compensation issues. (Fund's Mot. Br. at 5-6; Service Br. at 4-6.)

Yet, the Michigan legislature's bestowal of "exclusive

deny Plaintiff workers' compensation benefits–hinge, in part, upon whether Plaintiff is entitled to those benefits in the first instance. Lastly, a regulatory scheme of the Michigan legislature commits the resolution of one's entitlement to workers' compensation benefits in the first instance to the special competence of the WDCB. Specifically, Michigan's Workers' Disability Compensation Act ("the WDCA"), M.C.L. 418.841(1), provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.

The primary-jurisdiction doctrine's twin rationales are also met here. Given the complicated medical issues underlying Plaintiffs entitlement to workers' compensation benefits, the WDCB, rather than the Court, possesses the necessary expertise and the specialized knowledge properly to resolve those underlying issues and, thus, the ultimate issue of Plaintiff's entitlement to benefits. Deferring to the WDCB's determination of a plaintiff's entitlement to workers' compensation benefits in cases such as this would promote uniformity in such determinations. Thus, a consideration of the relevant factors counsels in favor of applying the primary-jurisdiction doctrine to stay the adjudication of Plaintiff's RICO claims, if they survive the instant motion.

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jurisdiction" over workers' compensation claims upon the WDCB simply allocates the judicial power of and between the Michigan courts. Article III, Section 1, of the United States Constitution empowers only the United States Congress, not a state legislature, to "ordain and establish"

the jurisdiction of inferior federal courts. As Article III, Section 2, of the Constitution makes clear, the federal judicial power shall extend to all cases arising under the Constitution or the laws of the United states, among others cases. Plaintiff's RICO

On the other hand, it is unclear whether the primary-jurisdiction doctrine properly applies in favor of a state administrative agency where the claim at issue arises under federal law and there is no competing federal forum. 73 C.J.S. Public Administrative Law and Procedure § 72. The majority of courts that have applied the primary-jurisdiction doctrine have done so in favor of a federal administrative agency.[4] *See Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952) (applying the doctrine in favor of the Federal Maritime Board in the context of federal claims); *Western Pac. R. R. Co.,* 352 U.S. at 63-64 (applying the doctrine in favor of the Interstate Commerce Commission in the context of federal claims); *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 631-32, 634 (6th Cir. 1987) (applying the doctrine in favor of the Federal Communications Commission in the context of federal claims).

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claims clearly arise under federal law such that Article III bestows subject-matter jurisdiction upon this Court to entertain them and any underlying issues upon which those claims hinge. Indeed, the principal issue underlying the application of the primary-jurisdiction doctrine is whether a federal court should postpone the exercise of its jurisdiction in deference to an administrative agency; the application of that doctrine does not divest the Court of its subject-matter jurisdiction. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 353(1963).

[4]At least one federal court sitting in diversity jurisdiction has applied the primary-jurisdiction doctrine in favor of state administrative agencies. *See Northwinds Abatement, Inc. v. Employers Ins. of Wausau,* 69 F.3d 1304, 1311(5th Cir. 1995) (holding that, under the doctrine, the district court should have stayed the diversity-jurisdiction

In *County of Suffolk v. Long Island Lighting Co.*, the United States Court of Appeals for the Second Circuit held that, subject to a narrow exception, the primary-jurisdiction doctrine does not apply in favor of a state administrative agency where there is a federal claim at issue and where there is no competing federal forum. 907 F.2d 1295, 1310 (2d Cir. 1990) (holding that the exception applies where a state administrative agency operates pursuant to a federal legislative scheme). The Second Circuit chiefly reasoned that the "theoretical underpinning of the primary-jurisdiction doctrine . . . is the authority [that] *Congress* intended th[e] [administrative] agency to exercise within a particular statutory scheme." *Id.* (emphasis in original); *see Far East Conference,* 342 U.S. at 574-75 (addressing the doctrine in terms of a regulatory scheme that Congress created, and noting that courts and administrative agencies are "means adopted to attain the prescribed end . . . through co-ordinated action"). The Second Circuit elaborated that, "[i]n the federal question/federal agency context, the creation of an agency and the grant to it of certain adjudicative authority may evince a congressional intent to limit the judiciary's jurisdiction." *County of Suffolk,* 907 F.2d at 1310. As the Court pointed out, "the independent act of a state legislature in creating a particular administrative body . . . can shed no light on *Congress*' intent to limit the jurisdiction of the federal courts[.]" *Id.* at 1311. While finding that the agency-expertise rationale underlying the primary-jurisdiction doctrine was implicated in the case, the Court underscored that it is that doctrine's theoretical underpinnings that control its applicability, "not the functional competence of an agency[.]" *Id.* at 1310.

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case pending the state workers' compensation commission's final decision on whether the defendant properly paid certain workers' compensation claims). It is unclear, however, whether that federal court deferred to the state administrative agency's primary jurisdiction only on the

However, in the subsequent case of *Johnson v. Nyack Hospital,* the Second Circuit held that, under the primary jurisdiction doctrine, the district court should have stayed the plaintiff's federal antitrust claim pending a state administrative agency's determination of the complicated factual issues underlying that claim. 964 F.2d 116,122-23 (2d Cir. 1992) (noting that, under the distinct doctrine of exhaustion, the issue is whether Congress' statutory intent was to render a federal claim cognizable only in the first instance by an administrative agency, whether state or federal). While recognizing that most cases applying the primary-jurisdiction doctrine did so in favor of a federal administrative agency, the Court reasoned that the application of that doctrine there served the underlying rationales of agency expertise and judicial economy. *Id.* The Court neither mentioned nor distinguished *County of Suffolk.* Thus, it is unclear what remains, if anything, of the precedential value of *County of Suffolk.*

As discussed below, in any event, the *Burford* doctrine would compel the stay of Plaintiff's RICO claims pending the WDCB's final determination of Plaintiffs entitlement to workers' compensation benefits.

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ground that the *Erie* doctrine would compel such deferral. *See* 73 C.J.S. Public Administrative Law and Procedure § 72; *Virginia Imports, Inc. v. Kirin Brewery of Am., LLC,* 296 F. Supp. 2d 691, 698, 698 n.1 (E.D. Va. 2003) (holding that, in a diversity-jurisdiction case involving only state claims, the primary-jurisdiction doctrine does not apply in favor of a state agency, as compared to a federal agency, and holding that, even if the doctrine were to apply, a federal district court sitting in diversity would defer to a state agency's primary jurisdiction only if state courts would so defer).

2. *Burford* Abstention Doctrine

The *Burford* abstention doctrine takes its name from the Supreme Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Rouse v. DaimlerChrysler Corporation*, the United States Court of Appeals for the Sixth Circuit underscored that the aim of the *Burford* doctrine is to "avoid conflict with a state's administration of its own affairs." 300 F.3d 711, 716 (6th Cir. 2002). The Sixth Circuit held that, therefore, the *Burford* doctrine "applies only if a federal court's decision on a state law issue is likely to 'interfere with the proceedings or orders of state administrative agencies.'" *Id.* (internal quotation marks omitted). The Sixth Circuit further held:

> The *Burford* abstention [doctrine] should not be applied unless: (1) a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or (2) the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

Id. (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)); *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996) (implicitly recognizing that the *Burford* doctrine may apply where the case involves either a "state-law claim" or "an assertion that the federal claims [were] . . . entangled in a skein of state law that must be entangled before the federal case can proceed") (internal quotation marks omitted). Since *Burford*, the Supreme Court has held that a federal court may dismiss or remand a complaint "based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. at 731 (illustrating such equitable or discretionary relief with suits for injunctive relief or certain classes of declaratory judgments). However, the Court noted that, in actions "at

law" or for damages, it has only permitted federal courts, based on abstention principles, to "enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether." *Id.* at 719.

The Fund contends that, under the *Burford* doctrine, the Court should stay the adjudication of Plaintiff's RICO claims pending the WDCB's final determination of Plaintiff's entitlement to workers' compensation benefits in the first instance. (Fund Br. at 9.) Plaintiff, in response, maintains that the Fund has failed to present any meaningful argument on the applicability of the *Burford* doctrine to Plaintiff's RICO claims. (Resp. to Fund at 11.) However, the *Burford* doctrine implicates important issues of comity.

The determination of Plaintiffs entitlement to workers' compensation benefits in this federal forum would likely frustrate or undermine Michigan's workers' compensation scheme, as set forth in the WDCA. That administrative scheme is comprehensive, setting forth the nature and amount of the particular benefits to which it affords entitlement, the scope of any such entitlement, and the administrative and judicial processes for resolving any disputes regarding that entitlement. As even a cursory review of Dr. Ray's medical report demonstrates, the determination of Plaintiffs entitlement to workers' compensation benefits hinges upon complex medical issues. Given the expertise and specialized knowledge necessary to resolve such underlying issues properly, the determination of Plaintiff's entitlement to workers' compensation benefits in this federal forum may result in an adjudication that would be contrary to that of the WDCB. Indeed, the frequent resolution, in a federal forum, of a plaintiff's entitlement to workers' compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCB.

Contrary to Plaintiff's assertion, an employee's

entitlement to workers' compensation benefits bears upon "policy problems of a substantial public import" or "matter[s] of substantial public concern." *See Rouse,* 300 F.3d at 716. (Resp. to Fund at 10.) As the Michigan Supreme Court has declared:

> The primary purpose of the . . . [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers. An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because the . . . [WDCA], under M.C.L. § 418.131(1) . . . , provides that this compensation is the exclusive remedy for a personal injury, except for an injury resulting from intentional tort. Thus, . . .[the WDCA's] purpose is to provide . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Simkins v. General Motors Corp., 453 Mich. 703, 710 (Mich. 1996). Thus, an employee's entitlement to workers' compensation benefits bears upon Michigan's significant interest in safeguarding the policy balance that the legislature struck in the WDCA by ensuring employees' speedy and no-fault recovery of guaranteed compensation for work-related injuries and by shielding employers, in exchange for providing their employees with such compensation, from liability beyond that which the WDCA permits. Moreover, both Michigan's employers and their employees have substantial interests in gaining their respective benefits from that regulatory balance. In determining an employee's entitlement to workers' compensation, a federal forum may not be as adept at

navigating that policy balance as the WDCB, to which the Michigan Legislature entrusted that task in the first instance. Moreover, the improper denial of an employee's entitlement to workers' compensation benefits for a work-related disability would be of great public important were that employee, consequently, to become a ward of the state.

Comparatively-speaking, in contrast to its substantial interest in resolving the federal-law issues of Plaintiff's RICO claims, this federal forum would have minimal interest in determining Plaintiff's entitlement to workers' compensation benefits. Thus, the Court would stay Plaintiff's RICO claims if they survived the instant motion, based on Plaintiff's claim of entitlement to workers' compensation benefits, pending a final determination of Plaintiff's entitlement to those benefits via Michigan's workers' compensation scheme.

3. RICO Claims

The RICO Act, 18 U.S.C. § 1961, *et seq.*, affords a civil remedy when an individual is "injured in his business or property" by virtue of a violation of § 1962 of the Act. *See* 18 U.S.C. § 1964(c)(providing that the person may "recover threefold the damages [that] he sustains and the cost of the suit, including a reasonable attorney's fee"). Section 1962(c) of the RICO Act provides, in part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity .. .

18 U.S.C. § 1962(c).

The RICO claims that Plaintiff's complaint sets forth

solely arise under § 1962(c).[5] In

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[5]Plaintiff contends that his complaint also pleads RICO claims under 18 U.S.C. § 1962(a). (Resp. to Service at 4.) Section 1962(a) provides in part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Plaintiff argues that his complaint pleads claims under § 1962(a) because it alleges that Defendants fraudulently deprived him of money. (Resp. to Service at 4.) According to Plaintiff, this allegation necessarily implies that Defendants violated § 1962(a). (Id.) In support, Plaintiff asserts that, if Defendants defrauded Plaintiff out of his workers' compensation benefits, they "used" the money retained from those benefits in the "operation" of an "enterprise" since Defendant clearly did not "burn the money." *(Id.* at 5.) Rather, according to Plaintiff, Defendants spent the money "on wages or supplies or rent or distributed it as profit while participating in the enterprise." (Id.) Plaintiff argues that "an allegation of fraud is an allegation that the enterprise took money and 'used' it in its activities." (Id.)

However, the inferences necessary to plead claims under § 1962(a) cannot reasonably be drawn from the allegations in Plaintiff's complaint. This failure to expend does not amount to "income" from a pattern of racketeering activity. Thus, Plaintiff's complaint fails to plead claims under § 1962(a).

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the instant motions to dismiss, Defendants contend that Plaintiff's complaint, however, fails to plead claims under § 1962(c) for which relief may be granted.

The elements of a viable cause of action under 18 U.S.C.§ 1962(c) are: 1) the conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Central Distributors of Beer, Inc. v. Conn, 5* F.3d 181 (6th Cir.

1993)(quoting *Sedima v. Imrex,* 473 U.S. 479, 496 (1985)). Section 1961(1)(B) of the RICO Act defines the requisite "racketeering activity" to include, as a predicate act, "any act which is indictable under any of the following provisions of title 18, United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . [and] section 1512 (relating to tampering with a witness, victim, or an informant)[.]" 18 U.S.C. § 1961(1)(B). Section 1961(5) of the RICO Act mandates that the requisite "pattern of racketeering activity" include at least two acts of such activity, which must have occurred within a ten-year period. 18 U.S.C. § 1961(5).

a. Predicate Acts

Plaintiff's complaint appears to allege seven distinct predicate acts. The complaint seems to allege the following predicate acts of mail fraud under 18 U.S.C. § 1341, which allegations are summarized as follows:[6]

[6]Plaintiff argues that his complaint only alleges three predicate acts of mail fraud, without expressly identifying those acts. It is unclear whether this assertion by Plaintiff constitutes a disavowal of reliance upon any other acts of mail fraud or merely reflects a counting error. (Resp. to Harrison at 3, 4, 7; Resp. to Fund at 5.)

1) On July 24, 2003, the Fund, via employee Jackson and from Farmington Hills, Michigan, mailed through the U.S. mail to Plaintiff in Taylor, Michigan, a Notice of Dispute terminating Plaintiff's workers' compensation benefits on the ground that he was "fully released to [his] job"; this termination was fraudulent because Defendants knew that Dr. Smith and Dr. Balarezo had not fully released Plaintiff to his job, and Harrison subsequently refused to permit Plaintiff to work within his restrictions (Compl. at ¶ 9(c), (d));

2) On March 25, 2004, the Fund and the Service sent to Plaintiff in Taylor, Michigan, via the U.S. mail a notice of examination by Ray; this notice was part of Defendants' fraudulent scheme to deprive Plaintiff of his workers' compensation benefits in that Defendants, through their attorney, Thaddeus Felker, relied upon Ray to use that examination to provide a false "cut off" medical report by which Defendants could terminate such benefits, rather than to examine Plaintiff objectively or truthfully (Compl. at ¶ 9(f));

3) After April 8, 2004, but before April 26, 2004, Ray, in Warren, Michigan, mailed via the U.S. mail to the Fund and the Service in Farmington Hills, Michigan, the report of his April 8, 2004, medical examination of Plaintiff, which report fraudulently stated that Plaintiff was no longer disabled due to a work-related condition (Compl. at 9(f));

4) On April 26, 2004, Defendants' agent, attorney Felker, in Birmingham, Michigan, mailed Ray's report, via the U.S. mail, to Plaintiff's attorney in Southfield, Michigan (Compl. at ¶ 9(0); and

5) On April 16, 2004, the Fund, via employee Jackson, mailed from Farmington Hills, Michigan, via the U.S. mail to Plaintiff in Taylor, Michigan, a Notice of Dispute stating "no work[-]related disability"; this statement was fraudulent in that Defendants knew that Dr. Smith had found Plaintiff disabled and that Dr. R4 had not objectively examined Plaintiff (Compl. at ¶ 10.).

Allegations 2 -5 relate to the medical examination diagnosis of Defendant Ray. The complaint also alleges a

predicate act of mail and/or wire fraud under 18 U.S.C. §§ 1341 or 1343, respectively.[7] The allegations that potentially relate to this predicate act are summarized as follows:

> 6) Defendants expressly or tacitly communicated to Dr. Ray that it wanted to obtain a "cut off' medical report, and Dr. Ray knew that he was not to perform an objective examination of Plaintiff. Defendants used the mail and electronic communications to further this fraud by communicating amongst each other to perpetrate this fraud. Defendants used the wires for interstate communications in effectuation of their scheme. (Compl. at IN 9(f), 16.)

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[7]Perhaps to anticipate a finding of insufficient pleading, Plaintiff seemingly disavows any reliance upon this wire-fraud allegation. Rather, according to Plaintiff; his complaint pleads "four predicate acts (three acts of mail fraud plus witness tampering/obstruction of justice)." (Pl.'s Resp. to Harrison at 3, 4, 7; Pl.'s Resp. to Fund at 5.)

The complaint also alleges a predicate act of witness tampering, as follows:

> 7) Defendants' actions violated 18 U.S.C. § 1512. (Compl. at

(1) Witness Tampering

Harrison argues that Plaintiff's complaint fails to sufficiently plead a predicate act of witness tampering under 18 U.S.C. § 1512. (Harrison Reply at 3.) Paragraph 11 of Plaintiff's complaint alleges the totality of Plaintiff's

claim regarding § 1512:

> Defendants' actions violated 18 U.S.C. § 1512. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

This is not a sufficient pleading to proceed further on his claim, given the motion to dismiss. This claim does not explain how Defendants' actions violated § 1512. Accordingly, the Court dismisses Plaintiff's claim of a RICO violation tied to 18 U.S.C. § 1512.

(2) Mail and/or Wire Fraud

A plaintiff must prove each element of the predicate act or "racketeering activity" for a civil action under the RICO Act to lie. *Central Distributors of Beer, Inc. v. Conn,* 5 F.3d 181, 183-84 (6th Cir. 1993). "To allege a violation of the mail fraud statute, it is necessary to show that: 1) the defendants formed a scheme or artifice to defraud; 2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and 3) the defendants did so with the specific intent to deceive or to defraud." *Id.* at 184 (citing *Schreiber Distributing v. Serv-well Furniture,* 806 F.2d 1393, 1399 (9th Cir. 1988)).

Where a plaintiff relies upon mail or wire fraud to constitute a predicate act under RICO, Rule 9(b) requires that he must allege, at a minimum, the time, place, and contents of the fraudulent communications. *Bender v. Southland Corp.,* 749 F.2d 1205, 1216 (6th Cir. 1984).

(a) Requisite Particularity

In its motion to dismiss, Harrison contends that Plaintiffs complaint fails, as a matter of law, to plead the

predicate acts of wire or mail fraud underlying his RICO claims with the particularity that Rule 9(b) requires. (Harrison Br. at 4-5.) Specifically, Harrison contends that Plaintiffs complaint fails to plead the time, place, and contents of the communications underlying the alleged predicate acts of mail and/or wire fraud. (Id.)

Federal Rule of Civil Procedure 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Plaintiff's complaint pleads the time, place, and contents of the communications that he claims underlie five alleged predicate acts of mail fraud, per paragraphs 9(c),(d),(0, and 10 and as numbered 1-5 above. [8] Indeed, Plaintiff's complaint alleges the time of each mailing, the sender and recipient of each mailing, the locations of the sender and recipient of each mailing, the content of each mailing, and how each mailing relates to the alleged RICO fraudulent enterprise. (1st Am. Compl. at VII 9(c),(d),(0, 10.)

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[8]The Fund argues that, because the WDCA required Defendants to mail to Plaintiff the notice of examination by Ray, Ray's report, and the notices of dispute underlying these predicate acts of mail fraud, *See* M.C.L. 418.315 and WDCB Rule 408.33(1), such mailings cannot trigger liability under the RICO Act. (Fund's Br. at 6-7.) Yet, the mailing of those documents gives rise to predicate acts under the RICO Act, not only where the documents are fraudulent. *See Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio,* 900 F.2d 882 (6th Cir. 1990) (holding that, in a civil RICO case predicated upon mail fraud by its health care benefits' adjuster, the plaintiff employer sufficiently alleged scheme to defraud and mailing for purpose of executing that scheme, even if the contract required the bills and invoices in question such that they would have been sent regardless of whether the alleged scheme existed). In *Dana Corp.*, the Sixth Circuit ruled that the Supreme Court had held

in *Schmuck v. United States*, 109 S. Ct. 1443, 1449 (1989), that mailings that contain no false information themselves can still be sufficient to be part of the mail fraud. *Id.*

As to the sixth predicate act of mail and/or wire fraud, per paragraphs 9(f) and 16 and numbered as six above, Plaintiff's complaint fails to plead the time, place, or contents of that communication. (Compl. ¶ 119, 16.) In *Rotella v. Wood*, the United States Supreme Court affirmed that Rule 11(b)(3) provides some "flexibility" concerning Rule 9(b)'s particularity requirement. 528 U.S. 549, 560 (2000) (citing *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998), in which the court relaxed Rule 9(b)'s particularity requirements where the RICO plaintiff lacked access to all facts necessary to detail his claim). On the other hand, as Harrison notes, while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation. The Court strikes from the complaint this predicate act. Accordingly, the Court will not consider it as to further discussion of this motion.

(b) Pattern of Racketeering Activity as to Each Defendant

Harrison contends that Plaintiff's complaint fails to plead that Harrison committed at least two predicate acts of mail and/or wire fraud. (Harrison Br. at 4-5.) In essence, Harrison argues that Plaintiff must specifically allege predicate acts attributable to Harrison, rather than predicate acts attributable to other Defendants or unidentified employees associated with Harrison. (*Id.* at 7.) Plaintiff concedes that the complaint does not allege any communications, whether fraudulent or otherwise, by Harrison or one of its employees. (Resp. to Harrison at 5.) Plaintiff argues that his complaint, nevertheless, alleges fraudulent communications that are attributable to Harrison because individuals acting in concert with

Harrison, as part of the fraudulent enterprise, made those communications. (Id.)

The Court finds instructive *In re American Honda Motor Company, Inc. Dealerships Relations Litigation*, 958 F. Supp. 1045 (D. Md. 1997), the authority upon which Plaintiff relies. In that case, the district court refused to dismiss the plaintiffs' civil RICO claim under § 1962(c) based upon predicate acts of mail fraud. *Id.* at 1048, 1055. The court expressly held that, for liability under § 1962(c), it is insufficient that a defendant "conduct[ed] or participate[d] directly or indirectly, in the conduct of [an] enterprise's affairs"; rather, the defendant must also have done so "through a pattern of racketeering activity." *Id.* at 1057-58. Thus, the district court, in essence, held that each defendant must engage in the requisite "pattern of racketeering activity"-i.e. the commission of at least two predicate acts.

As to the defendant law firm in *American Honda* alleged to have "participated in managing the concealment of the illegal scheme," the court noted that the plaintiffs' complaint did not allege that the law firm mailed any of the fraudulent materials. *Id.* at 1048, 1057. The court observed that, unless aiding and abetting principles were to apply, the defendant law firm could not have engaged in the predicate acts of mail fraud. *Id.* at 1057. The court then held that aiding and abetting principles apply to the substantive predicate acts under § 1961(1) and, thus, to the determination of whether a defendant participated in the enterprise through a "pattern of racketeering activity.[9] *Id.* at 1058-59 (relying, in part, upon 18 U.S.C. § 2, which renders an individual who aids and abets in an offense against the United States punishable as a principal). According to the court, the application of such principles to the predicate acts under § 1961(1)

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[9]As the district court in *General Motors Corporation v. Ignacio Lopez de Arriortua*, 948 F. Supp. 670 (E.D. Mich. 1996), pointed out:

In *Central Bank [of Denver, N.A. v. First*

> *Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)], the Court held that there was no aiding and abetting liability under section 10(b) of the Securities and Exchange Act because Congress did not expressly impose such liability. The phrase 'directly or indirectly' as used in the statute did not suffice to impose aiding and abetting liability. Since *Central Bank*, lower courts have considered whether the *Central Bank* ruling means that there is no[] cider and abettor liability under RICO, because, like the Securities and Exchange Act, RICO does not expressly provide for such liability. Courts are in disagreement on whether one can be liable for aiding and abetting under section 1962(c).

In *Reves v. Ernst & Young*, the Supreme Court held that, to have "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs" for purposes of § 1962(c), a person must have had an operational or management role in the enterprise. 507 U.S. 170, 185 (1993). The Court further noted that the term "participate" in § 1962(c) has a narrower meaning than to "aid and abet." Id.

In *American Honda Motor Company,* the district court held that *Reves* implicitly forecloses the application of aiding and abetting principles to the determination of whether a person "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs." 958 F. Supp. at 1058-59. However, in finding that aiding and abetting principles apply to the substantive predicate acts in § 1961(1), the district court eschewed the notion that it was "bringing through the back door that which *Reves* bars at the front." *Id.* at 1058. Rather, according to the court, the distinction between the applicability of aiding and abetting principles to § 1961(1) as compared to § 1962 (c) itself "is key to a proper understanding of *Reves,* and it brings within the ambit of § 1962 (c) precisely those defendants who belong there," as discussed above. *Id.*

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would afford a "principled basis for imposing § 1962(c) liability upon a class of defendants whom Congress surely intended . . . [to] be within the statute's purview: leaders of enterprises who do not themselves commit predicate acts but who cause others to do so"; otherwise, "the highest-level managers of a criminal enterprise who leave the hands-on work to others would be excluded from liability under § 1962(c) by virtue of the "through a pattern of racketeering activity" phrase.[10] *Id.* at 1058-59. The court then found that the defendant law firm aided and abetted in the commission of the predicate acts of mail fraud. *Id.* at 1059.

Finding *American Honda Motor Company* persuasive, the Court holds that aiding and abetting principles and/or the language of the mail fraud statute–"causes to be deposited"–apply to the substantive predicate acts under § 1961(1), including predicate acts of mail and/or wire fraud, and, thus, to the determination of whether a defendant participated in the enterprise through a "pattern of racketeering activity." Plaintiff's complaint specifically alleges that: 1) the Fund, either itself or via its employee Cindy Jackson, committed three predicate acts of mail fraud by mailing two fraudulent Notices of Dispute and one fraudulent notice of examination to Plaintiff (Compl. at ¶¶ 9(c), 9(f), and 10.); 2) Ray committed one predicate act of mail fraud by mailing his fraudulent report (*Id.* at 9(f)); and 3) Attorney Felker, Defendants' agent, mailed Ray's fraudulent report (Id.).

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[10]The court, in *American Honda*, noted, however, that some of the statutes that § 1961(1) lists as predicate acts "themselves render culpable not only persons who commit the prohibited acts but also persons who cause the acts to be committed." 958 F. Supp. at 1059 n. 12. As the court illustrated, the mail-fraud statute, 18 U.S.C. § 1341, employs the language "causes to be deposited" and "causes to be delivered." *Id.*

Drawing all reasonable inferences from the allegations in Plaintiff's complaint in the non-moving party's favor, the Court finds that Plaintiff's complaint gives rise to a reasonable inference that Harrison could be liable, under aiding and abetting and/or "causation" principles, for at least two predicate acts of mail and/or wire fraud. The alleged predicate acts of mail fraud surround Plaintiff's entitlement to workers' compensation benefits as well as the termination of those benefits. Plaintiff's complaint alleges that "[d]ecision regarding paying claims or terminating payment were made jointly by [D]efendant corporations, or were made by the Fund and/or the Service . . . after consulting with each other and Harrison." (Compl. at 4.) Thus, Plaintiff's complaint alleges that Harrison participated, with the corporate Defendants, in making decisions regarding Plaintiff's entitlement to workers' compensation benefits.

In his motion to dismiss, Ray argues that Plaintiff's complaint fails to plead at least two predicate acts of mail and/or wire fraud that are attributable to Ray."[FN11] (Ray Mot. at 5.) Plaintiff's complaint specifically alleges that Ray himself committed one predicate act of mail fraud by mailing his report. (Compl. at ¶ 9(f)) Drawing all reasonable inferences from the allegations in Plaintiff's complaint in Plaintiff's

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[11]Ray also contends that Plaintiff's complaint neither alleges how Ray's medical report was fraudulent nor how any such report would have furthered the fraudulent RICO enterprise. (Mot. at 5-6; Reply at 4.) However, such a contention is incorrect.

Rather, Plaintiff's complaint alleges that: 1) Plaintiff's October 23, 2000, work-related injury permanently disabled him from unrestricted manual labor (Compl. at 7.); 2) in 2003, Dr. Smith, Defendants' doctor, determined that Plaintiff could only work with restrictions *(Id.* at ¶ 9 (a),(b)); 3) Dr. Balarezo, Plaintiff's doctor, determined that Plaintiff was not fully released to his job *(Id.* at ¶ 9 (c)); 4) Felker allegedly advised Defendants that Ray could provide a false "cutoff- report by which to terminate Plaintiff's workers' compensation benefits *(Id.* at ¶

9(f)); 5) Defendants communicated to Ray that they wanted a cut-off report and let it be known that he was not to perform an objective examination of Plaintiff; and 6) Ray examined Plaintiff and provided a medical report of that examination, which advised that Plaintiff was no longer disabled due to a work-related condition, with the purpose of giving Defendants a false "cut-off-report rather than objectively examining or reporting on Plaintiff's condition (Id.).

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favor, the Court finds that Plaintiff's complaint gives rise to a reasonable inference that Ray is liable, under aiding and abetting and/or "causation" principles, for at least one more predicate act of mail and/or fraud. Plaintiff's complaint specifically alleges that the Fund, via its employee Cindy Jackson, committed a predicate act of mail fraud by mailing a fraudulent Notices of Dispute based upon Ray's fraudulent medical report, and that the corporate Defendants, via Felker, committed another predicate act of mail fraud by mailing Ray's fraudulent report. (Compl. at¶¶ 9(f), 10.)

The Service, in its motion to dismiss, argues that Plaintiff's complaint fails to plead that the Service committed any predicate acts of mail and/or wire fraud because the Service was a defunct corporation that no longer operated during the time of those alleged acts. (Service Br. at 2.) In support, Defendant Service contends that it adjusted workers' compensation claims on behalf of Harrison, including the initial benefits claim that Plaintiff submitted to Harrison, until December 31, 2002, when the Fund terminated its contract with the Service. *(Id.* at 3.) According to the Service, since January 1, 2003, it has not adjusted any claims on behalf of Harrison and, indeed, ceased its operations and became defunct on that date. (Id.) The Service contends that the Fund and its employees, such as Cindy Jackson, assumed the operations and duties of the Service. (Id.)

Plaintiff's complaint does not allege any predicate acts that occurred before January 1, 2003. Moreover, at oral argument, Plaintiff conceded that the Service was no longer in existence as of January 1, 2003. Rather, according to Plaintiff, Cindy Jackson, who originally worked for the Service, stopped working for the Service and starting working for the Fund after the Service ceased operations. Based upon this concession, Plaintiff's complaint fails to plead at least two predicate acts that are attributable to the Service and, thus, fails to plead a RICO claim against the Service for which relief may be granted.[12] *See* 18 U.S.C. § 1961(5). The Court, therefore, DISMISSES Plaintiff's RICO claim against the Service.

(c) Detrimental Reliance as an Element of Mail and/or Wire Fraud Claims Under RICO

In its motion to dismiss, Harrison contends that Plaintiff's complaint must allege that Plaintiff detrimentally relied upon the communications underlying the predicate acts of mail and/or wire fraud as an element of those acts. Plaintiff contends otherwise.

In *Blount Financial Services, Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit held that a civil RICO complaint involving a predicate act of mail fraud must allege "with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact" to establish the "scheme to defraud" element of mail fraud. *Accord Bender v. Southland*

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[12] In any event, even if at least two of the predicate acts of mail and/or wire fraud that the complaint alleges were attributable to the Service, Plaintiff's RICO claims based upon those acts fail to state claims for which relief may be granted, as discussed below.

Corporation, 749 F.2d 1205, 1216 (6th Cir. 1984); *Central Distributors of Beer, Inc. v. Conn, 5* F.3d 181,184 (6th Cir. 1993). The Sixth Circuit continues to espouse this holding.[13]

While reliance is not a predicate-act requirement that must be pleaded in order to state a claim under RICO, the Sixth Circuit recently noted that "*Central Distributors [v. Conn., 5* F.3d 181, 184 (6th Cir. 1993),] held that a showing of reliance is required to establish standing in civil RICO cases, a holding that is not in conflict with the Supreme Court's decision in *Neder [v.United States,* 527 U.S. 1 (1999),] or this Court's decision in *[United States* v.] *Daniel,* [329 F.3d 480 (6th Cir. 2003)]." *Chaz Construction, L.L.C. v. Codell,* No. 04-5200, 2005 WL —(6th Cir. May 11, 2005) (unpublished opinion). In *Chaz Construction,* the Sixth Circuit recognized that, per *Neder,* the common-taw requirement of justifiable reliance has no place in federal fraud statutes, to wit, that reliance is not an element of mail or wire fraud. *Id.* At the same time, *Chaz Construction* noted that standing is not required in criminal prosecutions, and, "[t]herefore, the holding in *Central Distributors* that plaintiffs must plead reliance in order to establish standing in a civil RICO case does not conflict with the holdings in *Neder* and *Daniel* . . . ." *Id.*

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[13]*See VanDenBroeck v. Commonpoint Mortgage Co.,* 210 F.3d 696, 701 (6th Cir. 2000) (holding, in a civil RICO case based upon predicate acts of mail and wire fraud, that the plaintiff must plead "a material misrepresentation of fact that was calculated or intended to deceive persons of reasonable prudence and comprehension," and that the plaintiff "relied upon that material misrepresentation" to establish the fraud statutes' requisite "scheme to defraud"); *Armbruster v. K-H Corporation,* 206 F. Supp. 2d 870, 898 (E.D. Mich. 2002) (relying upon *Blount,* 819 F.2d at 152, and *Bender,* 749 F.2d at 1215, to hold that a civil RICO complaint based upon predicate acts of mail fraud

must plead the plaintiff's reliance upon the defendant's misrepresentation); *Paycom Billing Services, Inc. v. Payment Resources Int'l*, 212 F. Supp. 2d 732, 736 (W.D. Mich. 2002) (relying upon *VandenBroeck*, 210 F.3d at 701, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's material misrepresentation).

Plaintiff argues that his complaint sufficiently pleads his detrimental reliance upon Defendants' fraudulent communications underlying the predicate acts of mail and/or wire fraud, if such a showing were required. (Resp. to Harrison at 11.) Plaintiff's complaint, per paragraph 12, avers:

> Plaintiff relied on the fraudulent communications to the extent [that] he suffered the financial loss of having to pay attorney fees, medical care and medical mileage. Defendants' fraud directly caused injury to [P]laintiff because it deprived him of workers['] compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care.

As Harrison and Ray note, however, Plaintiff's complaint pleads, in essence, that he relied upon the alleged fraudulent communications by challenging and disclaiming the truthfulness or validity of the content of those communications, rather than assuming the truthfulness or validity of such content and by taking actions based upon that assumption to his detriment. (Harrison Reply at 5; Ray Mot. at 9.) Yet, the plaintiff must detrimentally rely upon the alleged fraudulent communications by virtue of being "deceived by" them. *See Grantham and Mann, Inc. v. American Safety Products., Inc.*, 831 F.2d 596, 606 (6th Cir. 1987).

Here, three of the six predicate acts of mail and/or wire fraud in Plaintiff's complaint, as numbered 1, 4, and 5 above, involve the mailing of Notices of Dispute setting forth the alleged reason for Defendants' denial of Plaintiff's workers' compensation benefits or the mailing of Ray's medical report stating that Plaintiff no longer had a work-related disability. (Compl. at 9(c), (d) (0.) However, instead of detrimentally relying upon those communications by virtue of being deceived by their content, Plaintiff, as their complaint acknowledges, challenged the validity of that content in the first instance. Thus, Plaintiff's injury arose, not from his reliance' upon such fraudulent communications, but, rather, from Defendants' denial of Plaintiff's workers' compensation benefits. *See Grantham,* 831 F.2d at 606.

Moreover, a plaintiff cannot detrimentally rely upon any alleged fraudulent communications that were not directed to him. *Cf. Central Distributors of Beer, Inc. v. Conn, 5* F.3d 181 (6th Cir. 1993). Here, an additional two of the six predicate acts of mail and/or wire fraud, as numbered 3 and 6 above, allege fraudulent communications by Defendants that were not directed at Plaintiff; rather, they involve Ray mailing his medical report to the Service and the Fund, and Defendants "expressly or tacitly communicat[ing]" to Ray that they wanted to obtain a cut-off report. (Compl. at 9(0, 16.) As to the remaining pr.. dicate act of mail fraud, as numbered 2 above, Plaintiff's complaint does not allege how he detrimentally relied upon the notice of examination by Ray that Defendants mailed to him. (Compl. at 9(f)).

The Court, therefore, DISMISSES Plaintiff's RICO claims for failure to meet the key element of "reliance."

b. Requisite "Pattern of Racketeering Activity"

Defendants argue that, even if Plaintiff's complaint were properly to plead at least two predicate acts, those acts would be insufficient to establish the requisite

"pattern" of such activity. (Harrison Br. at 6; Ray Mot. at 6.) In H.J., *Inc. v. Northwestern Bell Telephone Company*, the United States Supreme Court observed that, while the RICO Act, 18 U.S.C. § 1961(5), sets forth the minimum number of predicate acts necessary to establish the requisite "pattern of racketeering activity," it presumes that the requisite pattern entails something "beyond simply the number of predicate acts involved." 492 U.S. 229, 237 (1989). Rather, the Court held that, to establish a "pattern of racketeering activity," the plaintiff must demonstrate that the predicate acts are related and that they amount to, or threaten the likelihood of, continuing racketeering activity. *Id.* at 239-240.

As the Court elaborated, the issue of whether predicate acts are related depends upon such factors as whether the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (internal quotation marks omitted).

Harrison argues that the predicate acts that Plaintiff's complaint pleads are not "sufficiently contiguous and related in all relevant factors to as to constitute" the requisite pattern. (Harrison Br. at 7.) However, those predicate acts, as alleged in Plaintiffs complaint, are sufficiently related. The predicate acts alleged in Plaintiff's complaint involve Plaintiff as the victim of those acts, share the common purpose of fraudulently denying Plaintiff's workers' compensation benefits, and contribute to the execution of that common purpose. *See H.J. Inc.*, 492 U.S. at 240 (outlining such factors as whether the predicate acts have the same or similar victims, purposes, or results). When considering principles of airier-and-abetter liability, the predicate acts entail the same participants. *See H.J. Inc.*, 492 U.S. at 240 (outlining this as a factor in the relatedness determination). Moreover, several of the predicate acts that Plaintiff's complaint alleges involve mail fraud and, thus, entail the same method of commission. *See id.* (outlining this as a factor in the

relatedness determination). As Plaintiff's complaint makes clear, the alleged predicate acts are not "isolated events" but, rather, are "interrelated by distinguishing characteristics." *Id.* (internal quotation marks omitted).

Rather, the principal issue here is whether the alleged predicate acts amount to, or threaten the likelihood of, continuing racketeering activity. *See H.J. Inc.*, 492 U.S. at 239-240. In H.J., the Court explained that element as comprising "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241 (noting that lilt is, in either case, centrally a temporal concept"). According to the Court, "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 242 (holding that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct" are insufficient). The Court further held that a party alleging a RICO violation may also demonstrate the requisite continuity by proving that the predicate acts give rise to a threat of continuing racketeering activity; as the Court noted, RICO plaintiffs often attempt to establish continuity in this manner since they typically must bring the action before the substantial period of time in which to demonstrate a closed-period of continuity has occurred. *Id.* (holding that such a determination is faet-specific).

In *Columbia Natural Resources, Inc. v. Tatum,* the Sixth Circuit held, presumably as to the element of continuity,[14] that a court should consider various factors, such as: 1) "the length of time [that] the racketeering

[14]While the Sixth Circuit referred to those factors as being relevant to a determination of whether the requisite "pattern of racketeering activity" exists under the RICO Act, it also affirmed that the requisite pattern comprises two distinct elements: 1) relatedness of the predicate acts; and 2) continuity

of predicate acts. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1110 (6th Cir. 1995); *Fleischhauer, v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989). Because the enumerated factors do not compare the nature of the predicate acts, as the relatedness element requires, presumably, the factors bear upon the continuity element.

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activity existed [the longer the better]"; 2) "the number of different schemes (the more the better)"; 3) "the number of predicate acts within each scheme (the more the better)"; 4) "the variety of species of predicate acts (the more the better)"; 5) "the distinct types of injury (the more the better)"; 6) "the number of victims (the more the better)"; and 7) "the number of perpetrators (the less the better)." 58 F.3d 1101, 1110 (6th Cir. 1995). Illustrating the applicability of these factors, the Sixth Circuit noted that, "at one extreme is a perpetrator committing two predicate acts, in one day, in one scheme, causing a single injury, to a single victim," which circumstances do not demonstrate the requisite "pattern of racketeering activity," and, "[a]t the other extreme, [is] a perpetrator engineering dozens of schemes, and using myriad predicate acts to further each scheme, against numerous victims causing numerous injuries," which circumstances demonstrate the required pattern.[15] Id.

To sufficiently plead closed-period continuity, Plaintiff's complaint must plead "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242. Here, Plaintiff contends that the predicate acts that his complaint pleads "occur[] over two years." (Resp. to Harrison at 7.) However, the time between the first predicate act that is alleged, July 24, 2003, (Compl. at ¶ 9(c)), and the last predicate act that is alleged,

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[15]Providing, of course, that the predicate acts are related.

April 16, 2004, (Comp'. at ¶ 10.), spans less than 9 months. Such a period of time is not sufficiently "substantial" to demonstrate closed-period continuity.[16] *See H.J. Inc.*, 492 U.S. at 242 (holding that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct" are insufficient).

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[16]As the district court in *General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 670 (E.D. Mich. 1996), summarized:

> Courts have not adopted a bright line test of what period of time constitutes a minimum duration for a close-ended scheme. Under some circumstances, schemes lasting as long as eighteen months have been found insufficient to support a RICO claim. *See, e.g., Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir. 1994) (holding [that] racketeering activity over [a] seventeen month period did not satisfy continuity requirement under RICO because complaint alleged single criminal episode where defendant committed crimes to get one plaintiff to pay for one paint system) . . . ; *Gotham Print, Inc. v. American Speedy Printing Centers, Inc.*, 863 F. Supp. 447 (E.D. Mich. 1994) (holding [that] isolated acts of mail and wire fraud over [an] 18 month period did not satisfy pattern element of RICO). Under other circumstances, shorter schemes have been found sufficient to support a RICO allegation. *See, e.g., Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 750 F. Supp. 838 (N.D. Ohio 1990) (where [the] plaintiff brought RICO claim against two companies that allegedly received stolen trade secrets from plaintiff's former employee, court held thirteen months of predicates acts were sufficient to establish continuity).

Plaintiff contends that, in *General Motors Corporation*, the district court declined to dismiss a RICO case involving a single scheme of theft from one victim spanning a time period that is much less than that here. (Resp. to Harrison at 8.)

However, in *General Motors Corporation,* the relevant time period was sixteen months, as compared to the nine months at issue here.

To demonstrate open-ended continuity, in the alternative, the plaintiff must show that the predicate acts give rise to a threat of continuing racketeering activity. *Id.* The Court will consider, in turn, each of the factors that *Columbia Natural Resources, Inc.,* sets out. As to the number of different schemes, Ray contends that, at the most, the pleadings show the existence of a single scheme to deny Plaintiff's workers' compensation benefits. (Ray Mot. at 8.) In H.J., the Supreme Court aptly observed that the number of "schemes" depends upon the level of generality with which one views the alleged criminal activity, and, in illustrating the principle behind this observation, noted that one may view each fraudulent decision in pursuit of a single fraudulent objective as a distinct scheme. 492 U.S. at 241 n.3. In this case, therefore, while the alleged over-all fraudulent objective was to deny Plaintiff's workers' compensation benefits, each alleged predicate act to accomplish this aim could be viewed as a scheme within that greater scheme, especially where those predicates acts were punctuated by the termination of Plaintiff's benefits, a reinstatement of those benefits, and then another termination of those benefits. In any event, even if Plaintiff's complaint alleged only a single scheme, the Supreme Court noted in *H.J. Inc.* that, while evidence of multiple criminal schemes would be highly relevant to the continuity element, predicate acts may form the requisite pattern even if they fall within a single scheme. 492 U.S. at 236, 240; *see Fleischhauer,* 879 F.2d at 1298 (finding a "pattern of racketeering activity" where each defendant committed predicate acts of fraud, there were 19 victims of that fraud, and there was only a single scheme).

Regarding the number of predicate acts within each scheme, Plaintiff's complaint, arguably, alleges seven predicate acts within the greater scheme of terminating

Plaintiff's workers' compensation benefits. As to the length of time that the racketeering activity existed, it lasted not even 9 months. Concerning the "variety of species of predicate acts," Plaintiff's complaint alleges five predicate acts of mail fraud, one predicate act of mail and/or wire fraud, and one predicate act of witness tampering. Regarding "the distinct types of injury," Harrison aptly notes that Plaintiff's alleged injuries stem from Defendants' denial of Plaintiff's workers' compensation benefits. (Harrison Br. at 7.) As to "the number of victims," Plaintiff is the only alleged victim. [17] (Harrison Br. at 7.) Lastly, concerning "the number of perpetrators," Plaintiff's complaint alleges only 4: Harrison, the Service, the Fund, and Ray. The Court finds that these factors, on balance, counsel against finding an open-ended threat of racketeering activity.

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[17] *See Blue Cross and Blue Shield of Michigan v. Kamin,* 876 F.2d 543 (6th Cir. 1989)(observing that a defendant cannot insulate himself from civil RICO liability simply by repeatedly bilking the same victim, and holding that insurer sufficiently alleged continuity necessary to state RICO claim against chiropractor in connection with the submission of false treatment claims even though insurer was sole victim where each false claim involved a separate and distinct insured and at least one mailing, and there were two different schemes involving different types of false claims).

Of special note, Plaintiff claims that his complaint sufficiently pleads the requisite threat of continuity in that it demonstrates "the likelihood that . . . [the predicate acts] will continue for many more years because [P]laintiff is permanently disabled and remains subject to [D]efendants' scheme of payment/cut-off/payment/cut-off." (Resp. to Harrison at 7.) However, Defendants' actions undermine Plaintiffs' claim of continuity; Defendants have submitted to the WDCB to resolve, once and for all, the issue of Plaintiff's entitlement to workers' compensation benefits rather than agreeing to pay those benefits voluntarily.

The Court concludes that, even if Plaintiffs complaint sufficiently plead at least two predicate acts, that complaint would, nevertheless, fail to allege that those acts amount to, or threaten the likelihood of, continuing racketeering activity so as to plead a "pattern of racketeering activity," as § 1962(c) requires. Based upon this alternative ground, the Court DISMISSES Plaintiffs RICO claims for failure to state claims for which relief may be granted.

c. Commerce Requirement

As the Sixth Circuit had held, "for purposes of § 1962(c), the criminal enterprise need only have a minimal impact upon interstate commerce." *United States v. Robinson,* 763 F.2d 778 (6th Cir. 1985). "Moreover, only the criminal enterprise itself ~~or the ra~~cketeering activities associated with the enterprise, not the conduct of each individual defendant, must affect interstate commerce." *Allen v. United States,* No. 01-1027, 2002 WL 2026279 at * 3 (6th Cir. 2002) (unpublished opinion).

The Fund, in its motion to dismiss, argues that Plaintiff's complaint fails to plead that the alleged enterprise affected interstate or foreign commerce, an element of a claim under 18 U.S.C. § 1962(c). (Fund Br. at 8) Plaintiff, in turn, points ~~to paragra~~ph 16 of his complaint, which alleges that "Defendants used the Postal Service and the wires for interstate communications in

effectuation of their scheme. . . ." (Resp. to Fund at 7.) In reply, the Fund questions how the complaint's allegations of mailings from Farmington Hills, Michigan, to Taylor, Michigan, Warren, Michigan, and to Southfield, Michigan, plead an affect on interstate commerce. (Fund Reply at 3.)

In the event that his complaint fails to plead RICO's interstate-commerce element adequately, Plaintiff seeks the Court's leave to file an amended complaint adding the following allegation:

> Defendants' enterprise affected interstate commerce and the movement of goods, services, and people in interstate commerce, in that (1) Harrison Piping operates in both Michigan and Ohio and owns a place of business in Ohio, and (2) the Fund must pay benefits to claimants wherever they live in the United States, and to Ohio residents if they are injured in Michigan as well as to Michigan residents if they are injured in Ohio.

(Resp. to Fund at 7.) However, because Plaintiff's RICO claims do not survive the instant motions to dismiss, any such amendment would be futile. *See Foman v. Davis,* 371 U.S. 178, 182 (1962).

d. Enterprise Requirement

For purposes of a claim under 18 U.S.C. § 1962(c), a plaintiff "must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name. *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 162 (2001). 18 U.S.C. § 1961(3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See Frank v. D'Ambrosi,* 4 F.2d

1378, 1386 (6th Cir. 1993) (holding that, to constitute an "enterprise," "an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages"). In sum, "one or more of the [d]efendants must be the single 'person' who acts upon the enterprise in such a way that the enterprise's affairs are conducted in the pattern of racketeering." *Ross v. Omnibusch, Inc.,* 607 F. Supp. 835, 838 (W.D. Mich. 1984); *see also Bennett v. Berg,* 685 F.2d 1053, 1060 (8th Cir. 1982). The pleadings must sufficiently describe the distinction between the separate "person" and the separate "enterprise." *Fleishhauer v. Feltner,* 879 F.2d 1290, 1296-97 (6th Cir. 1989).

Only "persons" may be liable for a violation of § 1962(c), not the "enterprise" itself. *Id.* at 1296. Moreover, liability under § 1962(c) hinges upon a "showing that the defendants conducted or participated in the conduct of the *'enterprise's* affairs, not just their *own* affairs." *Reves v. Ernst Young,* 507 U.S. 170, 185 (1993)) (emphasis in original).

Defendants maintain that Plaintiff's complaint fails to plead the existence of a distinct "person" and a distinct "enterprise" so as to sustain his § 1962(c) claim. (Service Br. at 8-9.) First, Defendants assert that Plaintiff's complaint simply alleges that Defendants constitute the "enterprise." *(Id.* at 10.) As Defendants note, paragraph 5 of the complaint alleges that "Defendants formed an 'enterprise' for purpose of RICO, and paragraph 15 alleges that "Defendant's Workers Compensation officials formed an 'enterprise' within the meaning of the RICO Act." *(Id.* at 9.) According to Defendants, Plaintiff's complaint fails to allege the existence of any "person." *(Id.* at 10.)

Plaintiff, in response, argues that his complaint, per paragraphs 5, 13, and 15, properly pleads the existence of an "enterprise" distinct from each "person" constituting that "enterprise." (Resp. to Service at 5-6.) Those paragraphs allege, in part:

> . . . Defendants formed an enterprise for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO) . . . .
>
> At all times and in all actions plead in this complaint, [D]efendants acted in concert with each other. Decisions regarding paying claims or terminating payment were made jointly by the corporate [D]efendants, or were made by the Service Company or the Association after consulting with Harrison, or were ratified by Harrison after being made by the Association or the Service Company. . . . . .
>
> Defendants' workers compensation officials formed an 'enterprise' within the meaning of the RICO Act. The members of the enterprise engaged, in this case, in the pattern of racketeering described above in para[graph] 9. Dr. Ray became part of the enterprise by his actions, described above. On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits.

(Compl.. at ¶¶ 5, 13, 15.)

Defendants, in reply, maintain that, as evident in the above-referenced paragraphs, Plaintiff's complaint alleges that the "enterprise" itself conducted the racketeering activity, and fails to allege that any "person" conducted such activity through the conduct of the enterprise's affairs. (Service Reply at 5.)

The Sixth Circuit noted, in *Begala v. PNC Bank, Ohio,* 214 F.3d 776, 782 (6th Cir. 2000), that "the complaint must contain facts suggesting that the behavior of the listed entities is `coordinated' in such a way that they

function as a 'continuing unit.'

Drawing all reasonable inferences from its allegations in Plaintiff's favor, the Court concludes that the complaint sufficiently alleges an "enterprise" as distinct from a "person." Although Plaintiff's complaint fails to expressly denominate each Defendant as a "person," it can be reasonably read to do so implicitly. While paragraph 15 alleges that "Defendants' workers compensation officials formed an 'enterprise' along with Dr. Ray, it also alleges that "[t]he members of the enterprise engaged . . . in the pattern of racketeering described . . . in para[graph] 9." Thus, contrary to Defendants' contention, Plaintiff's complaint alleges that the "members of the enterprise," rather than the enterprise itself, engaged in the racketeering activity. Because the "members of the enterprise" are engaging in the racketeering activity, one could reasonably infer that they are the requisite "persons." Moreover, because 18 U.S.C. § 1961(3) defines "person" singularly, rather than collectively, one could reasonably assume that each Defendant constitutes a distinct "person." Indeed, paragraph 6 of Plaintiff's complaint alleges that "[o]ne or more of these persons [Defendants] committed . . . mail fraud, wire fraud, and/or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits." Thus, drawing all justifiable inferences from Plaintiff's complaint in Plaintiffs favor, the Court finds that Plaintiff's complaint pleads each Defendant as constituting a "person" and the Defendants collectively, or all of the Defendants, as constituting the "enterprise." *See United States v. Console,* 13 F.3d 641, 653-54 (3d Cir. 1993).

Defendants next argue that, even if Plaintiff's complaint were to have pleaded one of the Defendants as the requisite "person," it would, nevertheless, fail to plead a "person" as distinct from the alleged "enterprise." (Service Br. at 10.) According to Defendants, Defendants cannot be both the "person" and the "enterprise." (Service Br. at 10.) However, in *Fleischhauer v. Feltner,* the Sixth Circuit held that pleadings that alleged that "each of the

five defendants was a `person' and together they formed a racketeering 'enterprise' properly plead a distinct "person" and "enterprise." 879 F.2d at 1296-97. This is so because the relevant comparison is between each "person" in the singular–here, each Defendant–and the "enterprise"–here, all of the Defendants–rather than between all of the "persons" and the "enterprise."

Defendants also contend that Plaintiff's complaint fails to allege that members of the enterprise engaged in racketeering activity as part of the enterprise's affairs, rather than as part of their own affairs. (Service Br. at 10.) However, as Plaintiff asserts, his complaint, per paragraphs 5, 13, and 15, as recited-above, pleads sufficiently that each "person" or individual Defendant participated in the conduct of the enterprise's affairs, rather than in merely his or its own individual affairs. (Resp. to Service at 6.) This is especially so where other portions of his complaint plead "a scheme by [D]efendants to fraudulently deprive [P]laintiff of his workers' compensation benefits." (Compl. at ¶9(f)

4. McCarran-Ferguson Preemption

Harrison argues that, under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the WDCA, M.C.L. 418.1101, *et seq.*, reverse-preempts Plaintiff's RICO claims. (Harrison Br. at 11.) Plaintiff contends otherwise. (Resp. to Harrison at 11.)

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance .. . unless such acts specifically relate to the business of insurance.

The purpose behind the McCarran-Ferguson Act is to establish "a form of inverse preemption, letting state law prevail over general federal rules–those that do not 'specifically relate to the business of insurance.'" *Nationwide Mutual Ins. Co. v. Cisneros,* 52 F.3d 1351, 1360 (6th Cir. 1995) (internal quotation marks omitted). However, under the Act, "when Congress enacts a law specifically relating to the business of insurance, that law controls." *Humana Inc. v. Forsyth,* 525 U.S. 299, 306 (1999). To recap, the McCarran-Ferguson Act precludes the application of a federal statute: 1) that does not "specifically relate to the business of insurance"; 2) in the face of state law "enacted . . . for the purpose of regulating the business of insurance"; and 3) where the federal statute would "invalidate, impair, or supersede" the state insurance law. *Id.* at 307.

As to the first prerequisite, the RICO Act is not a federal statute that "specifically relate[s] to the business of insurance." *Humana,* 525 U.S. at 307. Thus, the first prerequisite to reverse-preemption under the Act is met here.

Concerning the second prerequisite, a state law is "enacted . . . for the purpose of regulating the business of insurance" where: 1) it has the "effect of transferring or spreading the policyholder's risk"; 2) it is an "integral part of [the] policy relationships between [the] insurer and [the] insured"; and 3) it is "limited to entities within the insurance industry." *Medical Mut. of Ohio v. DeSoto,* 245 F.3d 561, 574 (6th Cir. 2001). The Court recognizes that whether Michigan enacted the WDCA "for the purpose of regulating the business of insurance" is, indeed, a thorny issue. The Court concludes, however, that the WDCA does, in fact, regulate the business of insurance.

First, the Court agrees with Harrison that the WDCA transfers or spreads a risk that is characteristic of insurance. *See Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982). (Harrison Br. at 12.) As the Michigan Supreme Court has opined, "[t]he primary purpose of the . .. [WDCA] is to provide benefits to the victims of work-related injuries

by allocating the burden [of] these payments to the employer and, thereafter, ultimately, to consumers." *Simkins,* 453 Mich. at 710.

Second, the Court agrees with Harrison that the WDCA is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *DeSoto,* 245 F.3d at 574. (Harrison Br. at 12.) The WDCA requires all Michigan employers to provide workers' compensation benefits to their employees, either by self-insuring or by purchasing insurance from a duly-authorized insurance company. If one were to define the employee as the insured and the self-insured employer as the insurer, then the WDCA would, indeed, be an integral part of the policy relationship between the employee and employer, so defined. If one were to define the non-self-insured employer and the employer's insurer or the employee and the employer's insurer as the insured and insurer, respectively, then the WDCA would still be an integral part of the policy relationship between those entities and individuals in that the employer and its insurer have, in essence, contractually agreed to have the insurer fulfill the employer's obligations to itsemployees under the WDCA.

Lastly, the Court concludes that the WDCA is "limited to entities within the insurance industry." Plaintiff, in essence, maintains that the WDCA is not limited to such entities because it reaches employers who are not self-insured, like Harrison, and, thus, is not limited to insurance companies.[18] (Resp. to Harrison at 11.) Yet, the WDCA does not include entities outside of the insurance industry simply because it reaches employees, whom one could characterize as either the insured or the

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[18]Plaintiff also underscores that Ray is simply a medical doctor and, thus, is not an individual within the insurance industry. (Resp. to Harrison at 11.) However, the relevant inquiry under *Humana* is whether the state-law at issue regulates the business of insurance, not whether each particular defendant is involved in the business of insurance.

beneficiaries of the insurance. Similarly, the WDCA does not include entities outside of the insurance industry simply because it reaches employers who elect to purchase insurance from an insurance company rather than to self-insure, which employers one could, then, characterize as the insured.[19] Furthermore, adjusters of insurance claims, like the Service, are entities within the insurance industry. *See Pireno,* 458 U.S. at 134 n.8.

The Court notes that the Michigan Legislature did not expressly associate the WDCA with the regulation of insurance. *See Biondo v. Life Ins. Co. of North Am.,* 116 F.Supp.2d 872, 883 (E.D. Mich. 2000). Rather, as Plaintiff aptly notes, Michigan Complied Laws place the WDCA in Chapter 418 dealing with labor rather than in Chapter 500 in the Insurance Code, and the Michigan's Department of Consumer and Industry Services, rather than the Michigan Insurance Bureau, regulates and has jurisdiction over the WDCA's administrative scheme. (Resp. to Harrison at 13, n.4.) However, the Court finds that this consideration, while relevant, is insufficient in itself to compel a finding that the WDCA does not regulate the business of insurance. Similarly, as Harrison points out, Plaintiff's attempt to characterize the provision of workers' compensation benefits as not comprising insurance is unpersuasive. (Resp. to Harrison at 12; Harrison Reply at 3.) Rather, the term "insurance" denotes "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." Black's Law Dictionary 802 (6th Ed. 1990). The WDCA simply deprives the parties of their

[19]Moreover, by electing to self-insure its obligation to provide workers' compensation benefits to its employees, pursuant to the WDCA's strict requirements, the employer, in effect, stands in the stead of an insurance company.

freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them. The scope of that bargain–to "compensate . . . for the loss on a specified subject by specified perils" or to compensate for work-related injuries here–remains unchanged.

As to the last prerequisite, the Supreme Court held, in *Humana Inc. v. Forsyth* that, when the federal statute does not "directly conflict" with the state law and "when application of the federal law would not frustrate any declared state policy or interfere with a [s]tate's administrative regime," the federal law does not "invalidate, impair, or supersede" the state law. 525 U.S. at 310. According to the Supreme Court, the term "invalidate" denotes "to render ineffective, generally without providing a replacement rule or law," and the term "supersede" denotes "to displace (and thus render ineffective) while providing a substitute rule." *Id.* at 308 (internal quotation marks omitted) (finding that the RICO Act would neither invalidate nor supersede Nevada insurance-fraud law).

As Plaintiff aptly notes, the RICO Act and the WDCA do not directly conflict. (Resp. to Harrison at 12.) Rather, one could comply with both the RICO Act and the WDCA. Moreover, the termination of workers' compensation benefits to which the employee is entitled would be actionable under the WDCA and, where part of a fraudulent RICO enterprise, would be actionable under the RICO Act as well. In other words, the RICO Act would not proscribe conduct–i.e. the termination of workers' compensation benefits to which the employee is entitled–that the WDCA would permit or prescribe. Consequently, the application of the RICO Act in this case would neither "render ineffective " nor "displace" the WDCA or any claim under that Act. Thus, applying the RICO Act here would neither invalidate nor supersede the WDCA.

Rather, at issue is whether applying the RICO Act to this case would "impair" the WDCA. The Supreme Court held that the term "impair" denotes "Rio weaken, to make worse, to lessen in power, diminish, or relax, or otherwise

affect in an injurious manner." *Humana,* 525 U.S. at 309-10 (internal quotation marks omitted). Moreover, as the Court noted, a federal law "impairs" a state law where it "frustate[s] any declared state policy or interfere[s] with a [s]tate's administrative regime." *Id.* at 310.

The RICO Act, in affording treble damages and a private right of action, provides Plaintiff greater recourse than that which the WDCA provides. In *Humana,* the Supreme Court addressed the issue of whether the RICO Act impairs Nevada insurance-law by providing materially-different remedies than that state law for purposes of the McCarran-Ferguson Act. 525 U.S. at 305. The court held that, although the RICO Act authorizes treble damages while Nevada's insurance-fraud law permits recovery of only compensatory and punitive damages, applying the RICO Act in that case would not impair the state law but, rather, would complement its remedial scheme. *Id.* at 313. Specifically, the Court noted that, based upon Nevada law's bad-faith exception to its punitive-damages cap, a plaintiff may be eligible understate law for damages exceeding those under the RICO Act. *Id.* at 313.

Here, Plaintiff would not be eligible to receive damages equal to or exceeding those available under the RICO Act by virtue of an exception to the exclusive remedies that the WDCA provides. *See* M.C.L.A. 418.131. As discussed below, Plaintiff's claims of intentional infliction of emotional distress surrounding Defendants' alleged fraudulent denial of Plaintiff's workers' compensation benefits under Michigan law fail to state claims for which relief may be granted.

As the Court previously noted, the purpose of the WDCA previously "is to provide ..not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Simkins,* 453 Mich. at 710. Thus, applying the RICO Act here to Plaintiff's claims that Defendants fraudulently denied Plaintiff's workers' compensation benefits so as to render Plaintiff eligible for

damages beyond which the WDCA permits would turn on its head the policy balance that the Michigan legislature struck in the WDCA. Indeed, employees would still receive the speedy and no-fault recovery of guaranteed compensation for work-related injuries under the WDCA, thereby reaping their respective benefits from that legislative balance. However, imposing liability under the RICO Act upon employers beyond that which the WDCA permits robs those employers of the benefits that they are to receive from the WDCA's policy balance. [20] To impose liability under the RICO Act upon employers' insurers of workers' compensation benefits or the claims' adjusters of those insurers, rather than the employers themselves, would still undermine the WDCA's policy balance in that any such liability would ultimately be passed on to the employers in the form of higher premiums. The Court finds that applying the RICO Act here would impair the WDCA.[21]

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[20]Plaintiff asserts that applying the RICO Act would encourage employers to pay valid claims rather than to deny them fraudulently and, thus, would promote the WDCA's aim of ensuring employees' quick recovery of benefits. (Resp. to Harrison at 13.) However, this argument ignores the other half of the bargain that the WDCA struck.

[21]Harrison argues that applying the RICO Act here would impair the WDCA's policy of permitting employers to make "voluntary" payments of workers' compensation benefits by chilling employers' exercise of that statutory right. (Harrison Br. at 12-13.) Presumably, Harrison is arguing that employers would be reluctant to settle claims for workers' compensation benefits under the WDCA if such settlement were to compromise defenses that they have in any RICO litigation surrounding those benefits. While this contention seems persuasive at first blush, the WDCA, M.C.L.A. 418.831, expressly provides that "[n]either the payment of compensation nor the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." Thus, a "[v]oluntary payment of compensation is not an admission of liability." *Gilbert v. Reynolds Metals Co.,* 228 N.W.2d 542, 545 (Mich. Ct. App. 1975).

Ray argues, in essence, that applying the RICO Act here would impair the WDCA's policy of permitting employers to conduct independent medical examinations for purposes of diagnosing a work-related disability because subjecting the medical practitioners who conduct those examinations to civil RICO liability would discourage medical practitioners to conduct such exams in the first instance and, thus, would undermine the employers' ability to secure such examinations. (Ray Mot. at 12.) Yet, medical practitioners conducting such independent medical examinations would only be subject to civil RICO liability if the examinations were fraudulent, and imposing RICO liability in such a situation would simply discourage fraud-prone medical practitioners from conducting independent medical examinations in their entirety or medical practitioners from conducting such examinations in a fraudulent manner. Moreover, the WDCA, M.C.L.A. 418.315, itself provides that "[a] health facility or health care provider that submits false or misleading records or other information to a carrier or the bureau is guilty of a misdemeanor. . . ." Thus, contrary to Ray's contention, subjecting the medical practitioners who conduct fraudulent medical examinations to RICO liability would be consistent with the WDCA's expressed policy of rendering such individuals liable.

Thus, the Court concludes that the WDCA reverse-preempts Plaintiff's RICO claims pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Court, therefore, DISMISSES Plaintiff's RICO claims on this alternate ground.

5. LMRA Preemption

The Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141 *et seq.*, governs the interpretation of collective bargaining agreements ("CBAs"). Section 301, which provides a federal cause of action for a breach of a CBA, states in part:

> Suits for violation of contracts between an employer and a labor organization

> representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). "[S]ection 301 not only confers federal jurisdiction over controversies involving . . . [CBAs], but also authorizes the federal courts to fashion a body of federal law for the enforcement of section 301." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1036 (6th Cir. 1989). Moreover, to develop a uniform body of national labor law and "to avoid conflicts in the interpretation of collective bargaining agreements," the federal law governing § 301 preempts state law. *Id.* Pursuant to this preemption doctrine, § 301 governs claims that directly rely upon rights that arise from CBAs and claims that substantially hinge upon the analysis or interpretation of collective bargaining agreements. Id.

"[F]ederal labor policy requires that individual employees wishing to assert [labor] contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress." *Id.* at 1039 (internal quotation marks omitted; emphasis in the original). Additionally, unless the employee utilizes the contractual procedures for settling his labor-contract dispute, his independent suit in district court based upon that dispute must be dismissed. *Id.* (internal quotation marks omitted).

In its motion to dismiss, Harrison argues that the LMRA preempts Plaintiff's RICO claims. Relying upon exhibits attached to its pleadings, Harrison contends that Plaintiff, as a warehouseman/driver for Harrison, was covered by a Collective Bargaining Agreement Local 247 of the International Brotherhood of Teamsters ("the CBA"). (Harrison Br. at 1.) According to Harrison, Plaintiff's RICO claims based upon Defendants' alleged fraudulent denial of Plaintiff's workers' compensation benefits, in essence,

allege a violation of the CBA such that the CBA's grievance and arbitration provisions govern those claims. *(Id.* at 16-17, 21.) Harrison asserts, however, that, because Plaintiff never filed a grievance regarding Defendants' alleged wrongful denial of his workers' compensation benefits, the Court must dismiss Plaintiff's RICO claims. *(Id.* at 17-18.)

As an initial matter, "[t]he use of the term 'preemption' in this setting . . . has a dissonant ring to it." *Trollinger v. Tyson foods, Inc.,* 370 F.3d 602, 608, 611 (6th Cir. 2004). Making such an observation, the United States Sixth Circuit Court of Appeals opined:

> To say that federal courts . . . [may not] hear a claim under one federal act (RICO) because it is 'preempted' by another federal act . . . is not a natural use of the term `preemption.' As federal courts generally use the term, preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.

Trollinger v. Tyson foods, Inc., 370 F.3d 602, 608, 611 (6th Cir. 2004) (internal quotation marks omitted). The Court further observed that a "cardinal principal of statutory construction" is that, "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both." *Id.* (internal quotation marks omitted). According to the Court, "[a]bsent an intolerable conflict between the two statutes," courts are unwilling to construe the subsequent federal act as repealing any portion of the former federal act. *Id.* (internal quotation marks omitted).

In any event, Harrison relies upon materials that transcend the pleadings to support its contention that § 301 of the LMRA preempts Plaintiff's RICO claims. Having already concluded that Plaintiff's RICO claims fail as a matter of law, the Court declines, in its discretion, to treat the instant motion to dismiss under that rule as a motion

for summary judgment pursuant to Rule 56 for purposes of adjudicating Harrison's contention that § 301 preemption affords another ground for summary dismissal of Plaintiffs RICO claims.

B. State-law Claims

Plaintiff's complaint alleges that each Defendant intentionally inflicted emotional distress upon Plaintiff in violation of Michigan law ("IIED claims"). (1St Am. Compl. at IN 17-19.)

Having dismissed all claims over which the Court has original jurisdiction, the Court would normally decline to exercise pendent jurisdiction, under 28 U.S.C. § 1367, over Plaintiff's IIED claims. *See Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). However, because the resolution of Plaintiff's IIED claims is necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiff's RICO claims under the McCarran-Ferguson Act, as addressed above, the Court will exercise pendent jurisdiction over Plaintiff's IIED claims.

Harrison maintains that Plaintiff's IIED claims fail to state claims for which relief may be granted. (Harrison Br. at 16.) While the Michigan Supreme court has yet to recognize formally the tort of IIED, it has described the elements that would be necessary to establish those claims. *Roberts v. Auto Owners Ins. Co.*, 422 Mich. 594, 697, 603 (Mich. 1985). Specifically, a plaintiff would have to demonstrate: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *Roberts,* 422 Mich. at 602. As to the requisite extreme and outrageous conduct, the Court has adopted the following standards that Restatement, Torts, 2d § 46, Commend D, sets forth:

> . . . [T]he conduct . . . [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

> Generally, the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, leaving him to exclaim, `outrageous.'

Id. at 603.

Plaintiff, in response, asserts that his IIED claims rest upon Defendants' alleged fraudulent denial of Plaintiff's workers' compensation benefits, rather than a mere wrongful denial of those benefits. (Resp. to Harrison at 16.) Plaintiff further contends that, under *Broadus v. Ferndale Fastener Div.,* 84 Mich. App. 593 (1978) and *Atkinson v. Farley,* 171 Mich. App. 784 (1988), his IIED claims state claims for which relief may be granted. (1st Am. Compl. at ¶ 17; Resp. to Harrison at 16.) In *Atkinson,* the Michigan Court of Appeals held that "[a]n insurer's wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." 171 Mich. App. at 790. The Court held, however, that the plaintiff's complaint alleged an TIED claim for which relief could be granted because it alleged the following:

> . . . [Defendants were in a position of control over [the] plaintiff's sole source of income, and knew that [the] plaintiff was extremely dependent upon the receipt of his [workers' compensation] disability benefits, yet abused their position by interfering with plaintiff's benefits, by ignoring the requirement to deal with his attorney, by threatening to cut off . . . [his] benefits, and by demanding that ... [he] repay them a large sum of money. . . . [D]efendants were abusing their control of [the] plaintiff's income . . . to harass and intimidate him to gain economic benefit for the insurance company.

Id. at 791.

In *Broadus,* the Michigan Court of Appeals held that the WDCA's exclusive-remedy provision does not bar an action for the intentional infliction of emotional distress surrounding the defendants' alleged collusion in denying workers' compensation benefits where the essence of the tort and the damage alleged is non-physical, such as emotional and mental distress damages. 84 Mich. App. at 597, 600, 600 n.4 (holding that the plaintiffs were not seeking as damages compensation for workers' compensation benefits, and noting that the defendants, on remand, are still free to challenge particular damage claims on the ground that the WDCA renders them compensable so as to bar them under its exclusive-remedy provision). As the Court of Appeals later clarified, *Broadus* never held that the failure to pay workers' compensation benefits based upon the facts there enabled the plaintiff to recover on his IIED claim. *Lisecki v. Taco Bell Restaurants, Inc.*, 150 Mich. App. 749, 755 n.1 (1986). Thus, contrary to Plaintiff's assertion, neither *Atkinson* nor *Broadus* sustains an IIED claim based merely upon the fraudulent denial of workers' compensation benefits.

Moreover, in *Hajciar v. Crawford & Co.*,the Michigan Court of Appeals even held that a claim that the defendant terminated the plaintiff's workers' compensation benefits to coerce the plaintiff into accepting a lump-sum payment that he had previously refused failed to state the requisite "extreme and outrageous" conduct and, thus, failed to state an IIED claim. 142 Mich. App. 632, 634, 639 (1985). In *Lisecki v. Taco Bell Restaurants, Inc.*, the Court of Appeals held that "[t]he facts in *Hajciar* were essentially identical to those presented here, i.e., an allegation by the plaintiff that . . . [the defendant] wrongfully terminated [his compensation benefits] . . . to further some ulterior motive of the defendants rather than due to the plaintiff's" non-entitlement to those benefits. 150 Mich. App. at 755 (holding so where the plaintiff alleged that the defendant had colluded to claim falsely that the plaintiff's physician had informed the claims adjuster that the plaintiff had

been released to work and where the plaintiff was later discharged from employment and denied workers' compensation benefits). According to the Court, "such conduct simply cannot be characterized as outrageous and atrocious." *Id.* (noting that the plaintiff had an adequate remedy for the termination of benefits with his WDCB claim).

In *Hailes v. Liberty Mutual Insurance Company*, the Michigan Court of Appeals suggested that "facts evidencing a continuous pattern of harassment, abuse, and unethical conduct" may constitute the requisite "extreme and outrageous conduct" for purposes of stating an IIED claim. No. 215509, 1999 WL 33326762 (Mich. Ct. App. Dec. 28, 1999) (relying upon *Atkinson,* 171 Mich. App. at 791). Plaintiff's complaint asserts that the corporate Defendants engaged in a "continuous pattern of harassment, abuse, and unethical conduct." (1 st Am. Compl. at 17; Resp. to Harrison at 16.) In support, Plaintiff's complaint simply alleges that Defendants entered into a voluntary agreement to pay Plaintiffs workers' compensation benefits and, soon thereafter, retained Ray to provide a false cut-off report by which Defendants could fraudulently deny Plaintiff's benefits. (Id.) However, Plaintiff's complaint, even when construed in Plaintiff's favor, fails to allege factual allegations rising to the level of the harassment, abuser, and unethical conduct that the Michigan Court of Appeals found actionable in *Atkinson. See* 171 Mich. App. at 790-91. Thus, Plaintiff's IIED claims fail to state claims for which relief may be granted under Rule 12(b)(6).[22]

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[22]In its motion to dismiss, Harrison maintains that § 301 of the LMRA preempts Plaintiff's IIED claims for the same reasons that § 301 preempts Plaintiff's RICO claims. (Harrison Br. at 17-18.) Because Plaintiff's IIED claims fail to state claims for which relief may be granted under Michigan law, the Court need not and does not reach this issue.

III. SUMMARY

For the preceding reasons, the Court:

1) DISMISSES Plaintiff's RICO claims because they fail to state claims for which relief may be granted, and because the WDCA reverse-preempts those claims under the McCarran-Ferguson Act; and

2) DISMISSES Plaintiff's state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: May 17, 2005

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on May 17, 2005.

s/Jonie Parker Case Manager

UNITED STATES OF AMERICA

DISTRICT COURT FOR THE EASTERN

DISTRICT OF MICHIGAN

TIMOTHY MOON,

Plaintiffs,

HARRISON PIPING SUPPLY,
a MI corporation and MICHIGAN
TOOLING ASSOCIATION WORKERS
COMPENSATION FUND and
MICHIGAN TOOLING
ASSOCIATION SERVICE
COMPANY, MI corporations,
and DR. ASIT RAY,
Defendants.

MAGISTRATE'S ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff's motion for leave to file his Second Amended Complaint having been heard Oct. 25, 2004, it is ordered:

1. Regarding the proposed addition of paragraph 8, the last sentence is stricken. With regard to the rest of paragraph 8, the filing of the Second Amended Complaint

is allowed as to those defendants whose Rule 12(b)(6) motions are denied.

2. Regarding the proposed addition of paragraph 19, the motion is denied without prejudice. Plaintiff may within 15 days of this order submit the factual basis for the allegations, and the court shall reconsider the addition based upon the submission.

Wallace Capel, Jr
Magistrate Judge, US District Court

STATUTES

FEDERAL

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executng such scheme or artifice or attempting so to do, places in any post office or authorized depository for maill matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1843

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be

fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471,472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the

obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 23412346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with

restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency

otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that ~~no person~~ may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud,

in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

STATE STATUTES AND ADMINISTRATIVE RULE

MCL Sec. 301 . (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employees' dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee' s disability or death.

MCL 418.315 . (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of an d in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this sate as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, CL 333.17401, as of May 20 1992. An employer is not required to reimburse

or cause to be reimbursed charges of services performed by a profession that was not licensed or registered by the laws of this state of or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee' s spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer' s carrier may file a petition objecting to the named physician selected by the employee and setting forth reason for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee' s choice, after notice to all parties and a prompt hearing by a worker' s compensation magistrate, the worker' s compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker' s compensation magistrate. The work' s compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

MCL 418.631 . (1) If any insurer licensed to transact the business of workmen' s compensation insurance within this state repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable or if it repeatedly fails to make reports to the director as provided in this act, the director may recommend to the commissioner of insurance that the license of the company be revoked, setting forth in detail the reasons for his recommendation. The commissioner shall thereupon furnish a copy of the report to the insurer and shall set a date for a hearing, at which both the insurer ad the director shall be afforded an opportunity to present evidence. If after the hearing the commissioner is satisfied that the insurer has failed to live up to al of its obligations under this act, he shall promptly revoke its license otherwise he shall dismiss the complaint.

Rule 408.33. (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier and the self-insurers' security found shall notify the bureau, on form 107, if the right of the injured or dependent to compensation is disputed. If compensation thereafter is paid, report it on form 701. A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

(2) The following subdivisions govern the administration and enforcement of the penalty provisions under section 801 of the act:

(a) Under section 801(a) of the act, compensation shall be paid promptly and directly to the person entitled to compensation. Weekly benefits become due and payable on the fourteenth day after the employer has notice of knowledge of the disability or death. On that date, all compensation which has accrued shall be paid. If benefits are not paid within 30 days of becoming due and payable, then the carrier shall pay to the employee $50.00 per day for each day after 30 days that the benefits remain unpaid, not to exceed $1,500.00.

NOTICE OF DISPUTE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

1. Social Security No.	2. Date of Injury	3. Employee Name (Last, First, MI)		
4. Employee Address (Street No. and Name)		5. City	6. State	7. Zip Code
8. Employer Name				9. Federal ID No.
10. Employer Street Address		11. City	12. State	13. Zip Code
14. Carrier or Self-Insured Name			15. NAIC or Self-Insured No.	16. Zip Code
17. Service Company/TPA Name (if applicable)			18. Service Co./TPA ID No.	19. Zip Code
20. Claim or File No.		21. County of Injury		22. County Code (if known)

23. Reason for Dispute

A. ____ Injury not work related
B. ____ Medical treatment not related to injury
C. ____ Further investigation required (please specify below)
D. ____ Additional information required from employee (please specify below)
E. ____ Vocational rehabilitation dispute only (please specify below)
F. ____ Other (please specify below)

Making a false or fraudulent statement for the purpose of obtaining or denying benefits can result in criminal or civil prosecution, or both, and denial of benefits.

Authority: Workers' Disability Compensation Act, R408.33 (1)
Completion: Mandatory
Penalty: Workers' Disability Compensation Act, 418.831; 418.891; R408.33

This is to certify that a copy of this form has been mailed or given to the injured employee.

24. Preparer's Name (Please print)	25. Signature	26. Telephone No.	27. Date

NOTICE TO EMPLOYEE

By filing this form, your employer or its workers' compensation insurance company has indicated to the Workers' Compensation Agency that it has a question or a dispute concerning the possible workers' compensation benefits to which you may be entitled. You may or may not agree with the position taken by the employer or insurance company.

If you feel that you are not receiving the benefits to which you are entitled, you should discuss this with your employer or a representative of its insurance company. If you have already done that or you are not satisfied with the discussion, you may file a formal application for mediation or hearing. You can obtain the appropriate forms or more information by contacting the Workers' Compensation Agency at our toll-free number of 1-888-396-5041 (if necessary, a TTY device is available at 517-322-5987). Additional information may also be found on our website at www.michigan.gov/wca.

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

WC-107 (Rev. 11/04)

BEST AVAILABLE COPY

UNITED STATES OF AMERICA

DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

TIMOTHY MOON,

Case No.: 03-73120

Plaintiffs,

Hon.: Paul D. Borman

Magistrate Judge Wallace Capel, Jr.

v

PROOF OF SERVICE

The undersigned certifies that this instrument, together with all referenced attachments was served on all parties to this case and/or their attorneys of record at their respective addresses as disclosed by the pleadings on_____ by the following method(s):

[] U.S. Mail [] Fax [] Hand Delivered
[] Federal Express [] UPS
[] Other:

_____
Signature of Server

HARRISON PIPING SUPPLY, a MI corporation and MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION and MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, MI corporations, and DR. ASIT RAY,

Defendants.

MARSHALL LASSER P25573
MARSHALL LASSER, P.C.
Attorney for Plaintiff
PO Box 2579
Southfield MI 48037
248 647 7722

RONALD G. ACHO P23913
THOMAS J. LAGINESS P33995
CUMMINGS,

MCCLOREY, DAVIS
& ACHO, P.L.C.
Attorney for Harrison Piping Supply
33900 Schoolcraft
Livonia, MI 48150
734-261-2400; fax 4510

C. F. BOYLE JR.
LAW OFFICE OF C. F. BOYLE, JR., PC
Attorney for Mich Tooling Assoc. Workers' Compensation Fund and Mich Tooling Association Service Company
1313 North Ritchie Court, Suite 1702
Chicago, Ill 60610-2141
312-440-1240; fax 1480

ELAINE A. PARSON P34493
RAYMOND & PROKOP, P.C.
Attorney for Michigan Tooling Association
26300 Northwestern Hwy., 4th Fl
P.O. Box 5058
Southfield, MI 48086-5058
248-357-3010; fax 2720

DAVID M. THOMAS P32470
RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.
Attorney for Dr. Asit Ray
4000 Penobscot Building
Detroit, MI 48226-4209
313-965-6100; fax 6558

SECOND AMENDED COMPLAINT AND JURY DEMAND

SECOND AMENDED COMPLAINT AND JURY DEMAND

[NOTE: the change in this Second Amended Complaint is to paragraphs 8 and 19]

JURISDICTION AND VENUE

1. Federal question jurisdiction is conferred by plaintiffs' claim under the Federal Racketeer Influence and Corrupt Organizations Act, 18 USC §1961 et seq (RICO), and the amounts in controversy exceed $75,000). Pendant jurisdiction of state claims is conferred by 28 USC §1367.

2. Venue is properly laid in the Federal District Court for the Eastern District of Michigan because plaintiffs reside in that district and defendants do business in person and through their agents and representatives in that district, in Wayne, Macomb and Oakland Counties, Michigan.

PARTIES

3. Plaintiff Timothy Moon resides within the jurisdiction of the court. The corporate defendants are MI corporations which do business in person and through their agents and representatives within the jurisdiction of this court. Dr. Asit Ray resides and works in Macomb County, MI.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. Plaintiff Timothy Moon is a MI resident who was employed in Wayne County at all relevant times by Harrison Piping Supply (Harrison), a MI corporation. The Michigan Tooling Association Workers Compensation Fund (the Fund) is a MI corporation which insured Harrison Piping Supply for workers compensation; Michigan Tooling Association Service Company (the Service Company) is a MI corporation which adjusted claims.

5. Decisions regarding paying claims or terminating payment were made jointly by defendant corporations, or were made by the Fund and or the Service Company after consulting with each other and

Harrison. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. Defendants formed an " enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

RICO COMPLAINT OF TIMOTHY MOON AGAINST DEFENDANTS

7. On October 23, 2000, plaintiff suffered an injury while working for Harrison Piping Supply, which permanently disabled him from working in unrestricted manual labor.

8. Defendants paid workers compensation for that injury until they suspended benefits on or about September 4, 2001. On Sept. 12, 2001, claim adjuster Cindy Jackson of defendant Michigan Tooling Association Service Company (" Service Company") sent by US mail to Timothy Moon at 8212 Margaret, Taylor, MI, a NOTICE OF DISPUTE which denied liability for workers compensation benefits to plaintiff and stated, " DATE OF INJURY DOES NOT FALL WITHIN OUR COVERAGE PERIOD OF 11-1-00 TO PRESENT. LIABILITY BELONGS TO AMERISURE PER 408.34(2)". This communication was fraudulent because the Service Company and the Michigan Tooling Association admitted on 10/21/02 they did insure plaintiff and other employees of Harrison Piping for workers compensation claims beginning on October 1, 2000, including plaintiff' s injury of October 23, 2000. This fraudulent act, in violation of

18 USC 1341 and 1343, forced plaintiff to undergo the expense of hiring an attorney . After litigating the case, defendants agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002. Defendants may have similarly defrauded other claimants during the same time period, and seeks discovery to uncover the identities of these people and the facts concerning their claims.

9. After benefits were reinstated, the following events occurred, which demonstrated a pattern of racketeering conduct, consisting of two or more predicate acts::

a. In 2003, defendants had plaintiff examined by a doctor of their choice, Dr. Brent Smith.

b. Defendant' s doctor, Smith, determined plaintiff could do a truck driving job limited to 8 hours work per day and no lifting over 40 lbs.

c. Defendants terminated workers compensation benefits on July 24, 2003, giving as the reason, " claimant fully released to job." This statement was contained within a Notice of Dispute mailed via the United States mailed by Cindy Jackson, an employee of the Fund, from Farmington Hills, MI, to plaintiff in Taylor MI, on July 24, 2003. This statement was fraudulent because defendants knew that defendants' examiner, Dr. Smith had written that plaintiff was *not* fully released to his job at time of injury, and that plaintiff' s treating physician, Dr. Alfredo Balarezo, had written that plaintiff was not fully released. (Plaintiff' s job at time of injury required lifting over 40lbs and required him to drive over 8 hours per day from time to time.)

d. Plaintiff asked Harrison Piping to take him back to work within his restrictions. Ray Dido of Harrison refused to take plaintiff back to work.

e. On March 25, 2004, the date set for trial in plaintiff' s workers compensation case, defendants reinstated plaintiff' s workers compensation benefits.

f. On or even before the same date defendants

reinstated plaintiff' s workers compensation, defendants conspired to again terminate plaintiff' s workers compensation benefits. On the same date defendants agreed to reinstate plaintiff' s workers compensation benefits, defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray. This notice was sent by the Fund and the Service Company to plaintiff in Taylor, MI, on March 25, 2004. The notice was parr of a scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a " cut off" medical report that defendants could use to terminate plaintiff' s benefits regardless of the true nature of his physical condition. Dr. Ray was known to defendants, through their attorney Thaddeus Felker, as a doctor who could be relied upon to write " cut off" reports in workers compensation cases; defendants and/or their attorney had relied upon him in the past to issue " cut off" reports. Defendants expressly or tacitly communicated to Dr. Ray that it wanted to obtain a " cut off" medical report, and Dr. Ray knew that he was not to perform an objective examination of plaintiff. On April 8, 2004, Dr. Ray examined plaintiff and wrote a report stating that plaintiff was no longer disabled due to a work related condition. Dr. Ray examined and reported on plaintiff not with the purpose of objectively determining whether plaintiff had a work related disability, but for the fraudulent purpose of providing the corporate defendants with a " cut off" report upon which they could rely in cutting off plaintiff' s workers compensation benefits. This report was mailed via the US mail by Dr. Ray in Warren, MI, to Michigan Tooling Association in Farmington Hills, MI, and then was mailed to plaintiff' s attorney in Southfield MI via the US mail by defendants' agent, attorney Felker, from Birmingham MI on April 26, 2004. Defendants used the mail and electronic communications to further this fraud, by mailing the

examination notice and the report and by communicating amongst each other to perpetrate this fraud. These actions violated 18 USC sections 1341 and 1343. These allegations are based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

10. On April 16, 2004, Cindy Jackson, Farmington Hills MI, an employee of the Fun, mailed via the US mail to plaintiff in Taylor, MI, a Notice of Dispute stating " no work related disability." This statement was fraudulent because defendants knew that their physician, Dr. Brent Smith, had repeatedly stated that plaintiff was disabled by a work-related disability, and that Dr. Ray had not provided an objective determination of plaintiff' s physical condition.

11. Defendants' actions violated 18 USC §1512. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

12. Plaintiff relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care.

13. At all times and in all actions plead in this complaint, defendants acted in concert with each other. Decisions regarding paying claims or terminating payment were made jointly by the corporate defendants, or were made by the Service Company or the Association after consulting with Harrison, or were ratified by Harrison after being made by the Association or the Service Company. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

14. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

15. Defendants' workers compensation officials formed an " enterprise" within the meaning of the RICO Act. The members of the enterprise engaged, in this case, in the pattern of racketeering described above in para. 9. Dr. Ray became part of the enterprise by his actions, described above. On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits..

WHEREFORE plaintiff demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
AND RETALIATION CLAIMS AGAINST THE CORPORATE DEFENDANTS

17. The corporate defendants engaged in a " continuous pattern of harassment, abuse and unethical conduct," as that phrase was used in *Hailes v Liberty Mutual Ins Co*, no 215509, 1999 WL 33326762 (Mich App Dec. 28, 1999), and their actions gave rise to a cause of

action recognized at common law by the Michigan courts in *Broaddus v Ferndale Fastener Division,* 84 Mich App 593, 269 NW2d 689 (1978), and *Atkinson v Farley,* 171 Mich App 784, 431 NW2d 95 (1988). On March 25, 2004, defendants entered into a " voluntary payment" agreement, under which they promised to pay all benefits accrued since benefits had been cut off, and promising to continue to pay benefits due plaintiff under Michigan Worker' s Disability Compensation Act. MCL 418.101 et seq, herein the Act). This settlement was mailed to all parties via the US mail. Defendants fraudulently entered into this settlement because it was made with the intent of terminating benefits dishonestly. On the same day defendants settled and promised to continue to pay benefits, it mailed via the US mail a notice to plaintiff requiring him to appear for an examination by Dr. A. Ray. Defendants' purpose in sending plaintiff to Dr. Ray was not to obtain an objective opinion concerning plaintiff' s condition, but to obtain a " cut off" report (a report stating plaintiff had no disability qualifying for benefits under Michigan Worker' s Disability Compensation Act. MCL 418.101 et seq, herein the Act).

18. MCL 418.301(11) provides that " a person shall not... in any manner discriminate against an employee because the employee.... instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee... of a right afforded by this act." Defendants violated this statute law by fraudulently terminating plaintiff' s benefits as hereinbefore described, causing the damages described in the preceding counts.

19. Harrison Piping retaliated against plaintiff for filing a workers compensation claim by refusing to return him to work and at the same time participating in a scheme to cut off workers compensation benefits on or about July 24, 2003, on the alleged ground that plaintiff refused favored work, all in violation of MCLA 418.301(11) and *Phillips v Butterball Farms Co,* 448 Mich 239, 531 NW2d 144 (1995).

20. As a result of defendants' conduct, plaintiff has suffered financial loss, depression, anxiety, and mental anguish.

WHEREFORE plaintiff Timothy Moon prays for judgment against HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION and MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, in an amount exceeding $75,000, plus interest, costs and attorney fees.

JURY DEMAND

Plaintiff demands a jury trial.

Marshall Lasser P25573
MARSHALL LASSER PC
Attorney for plaintiff
248 647 7722

Dated:

UNITED STATES OF AMERICA

DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

TIMOTHY MOON, Plaintiff

Hon. Paul D. Borman
Case No.: 04-71882

:

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

v

HARRISON PIPING SUPPLY, a MI corporation and MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND and MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, MI corporations, and DR. ASIT RAY,

Defendants.

_____/

Marshall Lasser P25573
MARSHALL LASSER, P.C.
Attorney for Plaintiff
PO Box 2579
Southfield MI 48037
248 647 7722

_____/

FIRST AMENDED COMPLAINT AND JURY DEMAND

[NOTE: the only change in this First Amended Complaint is the addition of the word FUND in the caption and the addition of the document name,

FIRST AMENDED COMPLAINT AND JURY DEMAND]

JURISDICTION AND VENUE

1. Federal question jurisdiction is conferred by plaintiffs' claim under the Federal Racketeer Influence and Corrupt Organizations Act, 18 USC §1961 et seq (RICO), and the amounts in controversy exceed $75,000). Pendant jurisdiction of state claims is conferred by 28 USC §1367.

2. Venue is properly laid in the Federal District Court for the Eastern District of Michigan because plaintiffs reside in that district and defendants do business in person and through their agents and representatives in that district, in Wayne, Macomb and Oakland Counties, Michigan.

PARTIES

3. Plaintiff Timothy Moon resides within the jurisdiction of the court. The corporate defendants are MI corporations which do business in person and through their agents and representatives within the jurisdiction of this court. Dr. Asit Ray resides and works in Macomb County, MI.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. Plaintiff Timothy Moon is a MI resident who was employed in Wayne County at all relevant times by Harrison Piping Supply (Harrison), a MI corporation.

The Michigan Tooling Association Workers Compensation Fund (the Fund) is a MI corporation which insured Harrison Piping Supply for workers compensation; Michigan Tooling Association Service Company (the Service Company) is a MI corporation which adjusted claims.

5. Decisions regarding paying claims or

terminating payment were made jointly by defendant corporations, or were made by the Fund and or the Service Company after consulting with each other and Harrison. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. Defendants formed an " enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

RICO COMPLAINT OF TIMOTHY MOON AGAINST DEFENDANTS

7. On October 23, 2000, plaintiff suffered an injury while working for Harrison Piping Supply, which permanently disabled him from working in unrestricted manual labor.

8. Defendants paid workers compensation for that injury until they suspended benefits in October 2001, forcing plaintiff to undergo the expense of hiring an attorney . After litigating the case, they agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002.

9. After benefits were reinstated, the following events occurred, which demonstrated a pattern of racketeering conduct, consisting of two or more predicate acts::

a. In 2003, defendants had plaintiff examined by a doctor of their choice, Dr. Brent Smith.

b. Defendant' s doctor, Smith, determined plaintiff

could do a truck driving job limited to 8 hours work per day and no lifting over 40 lbs.

c. Defendants terminated workers compensation benefits on July 24, 2003, giving as the reason, " claimant fully released to job." This statement was contained within a Notice of Dispute mailed via the United States mailed by Cindy Jackson, an employee of the Fund, from Farmington Hills, MI, to plaintiff in Taylor MI, on July 24, 2003. This statement was fraudulent because defendants knew that defendants' examiner, Dr. Smith had written that plaintiff was *not* fully released to his job at time of injury, and that plaintiff' s treating physician, Dr. Alfredo Balarezo, had written that plaintiff was not fully released. (Plaintiff' s job at time of injury required lifting over 40lbs and required him to drive over 8 hours per day from time to time.)

d. Plaintiff asked Harrison Piping to take him back to work within his restrictions. Ray Dido of Harrison refused to take plaintiff back to work.

e. On March 25, 2004, the date set for trial in plaintiff' s workers compensation case, defendants reinstated plaintiff' s workers compensation benefits.

f. On or even before the same date defendants reinstated plaintiff' s workers compensation, defendants conspired to again terminate plaintiff' s workers compensation benefits. On the same date defendants agreed to reinstate plaintiff' s workers compensation benefits, defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray. This notice was sent by the Fund and the Service Company to plaintiff in Taylor, MI, on March 25, 2004. The notice was parr of a scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a " cut off" medical report that defendants could use to terminate plaintiff' s benefits regardless of the true nature of his physical condition. Dr. Ray was known to defendants, through

their attorney Thaddeus Felker, as a doctor who could be relied upon to write " cut off" reports in workers compensation cases; defendants and/or their attorney had relied upon him in the past to issue " cut off" reports. Defendants expressly or tacitly communicated to Dr. Ray that it wanted to obtain a " cut off" medical report, and Dr. Ray knew that he was not to perform an objective examination of plaintiff. On April 8, 2004, Dr. Ray examined plaintiff and wrote a report stating that plaintiff was no longer disabled due to a work related condition. Dr. Ray examined and reported on plaintiff not with the purpose of objectively determining whether plaintiff had a work related disability, but for the fraudulent purpose of providing the corporate defendants with a " cut off" report upon which they could rely in cutting off plaintiff' s workers compensation benefits. This report was mailed via the US mail by Dr. Ray in Warren, MI, to Michigan Tooling Association in Farmington Hills, MI, and then was mailed to plaintiff' s attorney in Southfield MI via the US mail by defendants' agent, attorney Felker, from Birmingham MI on April 26, 2004. Defendants used the mail and electronic communications to further this fraud, by mailing the examination notice and the report and by communicating amongst each other to perpetrate this fraud. These actions violated 18 USC sections 1341 and 1343. These allegations are based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

10. On April 16, 2004, Cindy Jackson, Farmington Hills MI, an employee of the Fun, mailed via the US mail to plaintiff in Taylor, MI, a Notice of Dispute stating " no work related disability." This statement was fraudulent because defendants knew that their physician, Dr. Brent Smith, had repeatedly stated that plaintiff was disabled by a work-related disability, and that Dr. Ray had not provided an objective determination of plaintiff' s physical condition.

11. Defendants' actions violated 18 USC §1512.

This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

12. Plaintiff relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care.

13. At all times and in all actions plead in this complaint, defendants acted in concert with each other. Decisions regarding paying claims or terminating payment were made jointly by the corporate defendants, or were made by the Service Company or the Association after consulting with Harrison, or were ratified by Harrison after being made by the Association or the Service Company. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

14. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

15. Defendants' workers compensation officials formed an " enterprise" within the meaning of the RICO Act. The members of the enterprise engaged, in this case, in the pattern of racketeering described above in para. 9. Dr. Ray became part of the enterprise by his actions, described above. On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits..

WHEREFORE plaintiff demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS AGAINST THE CORPORATE DEFENDANTS

17. The corporate defendants engaged in a " continuous pattern of harassment, abuse and unethical conduct," as that phrase was used in *Hailes v Liberty Mutual Ins Co*, no 215509, 1999 WL 33326762 (Mich App Dec. 28, 1999), and their actions gave rise to a cause of action recognized at common law by the Michigan courts in *Broaddus v Ferndale Fastener Division,* 84 Mich App 593, 269 NW2d 689 (1978), and *Atkinson v Farley,* 171 Mich App 784, 431 NW2d 95 (1988). On March 25, 2004, defendants entered into a " voluntary payment" agreement, under which they promised to pay all benefits accrued since benefits had been cut off, and promising to continue to pay benefits due plaintiff under Michigan Worker' s Disability Compensation Act. MCL 418.101 et seq, herein the Act). This settlement was mailed to all parties via the US mail. Defendants fraudulently entered into this settlement because it was made with the intent of terminating benefits dishonestly. On the same day defendants settled and promised to continue to pay benefits, it mailed via the US mail a notice to plaintiff requiring him to appear for an examination by Dr. A. Ray. Defendants' purpose in sending plaintiff to Dr. Ray was not to obtain an objective opinion concerning plaintiff' s

condition, but to obtain a " cut off" report (a report stating plaintiff had no disability qualifying for benefits under Michigan Worker' s Disability Compensation Act. MCL 418.101 et seq, herein the Act).

18. MCL 418.301(11) provides that " a person shall not... in any manner discriminate against an employee because the employee.... instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee... of a right afforded by this act." Defendants violated this statute law by fraudulently terminating plaintiff' s benefits as hereinbefore described, causing the damages described in the preceding counts.

19. As a result of defendants' fraudulent conduct, plaintiff has suffered financial loss, depression, anxiety, and mental anguish.

WHEREFORE plaintiff Timothy Moon prays for judgment against HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION and MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, in an amount exceeding $75,000, plus interest, costs and attorney fees.

JURY DEMAND

Plaintiff demands a jury trial.

_____

Marshall Lasser P25573
Attorney for plaintiff
po box 2579
Southfield MI 48037
248 647 7722

Dated: May 5, 2004

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No. 06-891

Supreme Court, U.S.
FILED
FEB 0 5 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TIMOTHY MOON,

Petitioner,

v.

HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS' COMPENSATION FUND, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, AND DR. ASIT RAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

RONALD G. ACHO
THOMAS J. LAGINESS
CUMMINGS, MCCLOREY,
DAVIS & ACHO, P.C.
Attorneys for Harrison Piping Supply
33900 Schoolcraft Road
Livonia, MI 48150
(734) 261-2400

HAL O. CARROLL*
VANDEVEER GARZIA, P.C.
Attorney for Michigan Tooling Association Service Company and Michigan Tooling Association Workers' Compensation Fund
1450 W. Long Lake Road
Suite 100
Troy, MI 48098
(248) 312-2800

DALE A. ROBINSON
DAVID M. THOMAS
RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.
Attorneys for Dr. Asit Ray
4000 Penobscot Building
645 Griswold Street
Detroit, MI 48226
(313) 065-6100

C. F. BOYLE, JR.
LAW OFFICE OF C. F. BOYLE, JR.
Attorney for Michigan Tooling Association Workers' Compensation Fund
1313 North Ritchie Court
Suite 1702
Chicago, IL 60610
(312) 440-1240

* *Counsel of Record*
Counsel for Respondents

QUESTION PRESENTED

MAY AN EMPLOYEE WHOSE WORKER'S COMPENSATION BENEFITS HAVE BEEN TERMINATED, AFTER AN EVIDENTIARY HEARING BEFORE THE STATE AGENCY RESPONSIBLE FOR DETERMINING ENTITLEMENT TO SUCH BENEFITS, MAINTAIN A RICO ACTION ON THE BASIS THAT ONE OF THE MEDICAL WITNESSES WHOSE OPINIONS SUPPORTED THE CONCLUSION THAT THE WORKER WAS NO LONGER DISABLED ISSUED A FRAUDULENT MEDICAL OPINION?

CORPORATE DISCLOSURE STATEMENT

Respondent, Harrison Piping Supply, has no parent corporation and no publicly held company owns 10% or more of its stock. The Michigan Tooling Association Service Company ceased to exist by January 1, 2003 and its claim administrative functions were assumed by the Michigan Tooling Association Workers' Compensation Fund.

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COUNTERSTATEMENT OF FACTS

Petitioner's "Statement of the Case" consists of argument rather than a recitation of facts. The following facts are relevant to this case and the petition.

Petitioner was an employee of Respondent Harrison Piping Supply ("Harrison"), a member of the Michigan Tooling Association Workers' Compensation Fund ("Fund"). The Fund is composed of some 480 member companies that self-insure their workers' compensation exposure as permitted by Michigan law. The Michigan Tooling Association Service Company ("Service Company") had been the claims administrator for the Fund's workers' compensation claims, but it had ceased to exist by January 1, 2003 and its claim administrative functions were assumed by the Fund on that date. The Fund, not the Service Company, administered Petitioner's claim during the relevant time period.

Petitioner had been injured in the course of his employment at Harrison. Harrison filed the documents necessary to obtain a review of his status and determine if he continued to be disabled from work. After a hearing, Petitioner's worker's compensation benefits were terminated by a magistrate of the Michigan Worker's Compensation Bureau. The worker's compensation magistrate determined, after a hearing and review of six medical reports as well as supporting sworn deposition testimony, that Petitioner was no longer disabled from work. Petitioner sued, claiming that the denial was the result of a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*

The worker's compensation magistrate's opinion was 32 pages long and contained a detailed recitation and analysis of the medical and other evidence, concluding that Petitioner was no longer disabled from work. Petitioner claims that there was a pattern of racketeering activity consisting of five acts, which Petitioner alleged were fraudulent. Three of the allegedly fraudulent acts consisted of mailing a "Notice of Dispute," which, under the provisions of the Michigan Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws 418.101 *et seq.*, raised the issue whether Plaintiff continued to be disabled, required that he be examined by respondent Dr. Ray, and led to the proceeding before the worker's compensation magistrate. Petitioner claims that these Notices of Dispute were fraudulent because they falsely alleged that Petitioner was no longer disabled.

The fourth and fifth allegations of fraud relate to the report prepared by Dr. Ray, who found that Petitioner was no longer disabled. Petitioner alleges that Dr. Ray's opinion was fraudulent. The fourth alleged predicate act was Dr. Ray's mailing of the report with the "fraudulent opinion" to Defendant's attorney, and the fifth was the mailing of that report to Petitioner's attorney.

In chronological order the five allegedly fraudulent acts are:

1. July 24, 2003: Fund mailed a Notice of Dispute.

2. March 25, 2004: Fund mailed a notice, under the WDCA, that Plaintiff was required to be examined by a physician, Respondent Doctor Ray.

3. Between April 8 and April 26, 2004: Dr. Ray mailed his report of the examination that he performed on April 8.

4. April 16, 2004: Fund mailed a Notice of Dispute, which initiated the procedure that culminated in the Worker's Compensation Magistrate's finding on February 25, 2005 that Plaintiff was not entitled to benefits.

5. April 26, 2004: Defendant's attorney mailed Dr. Ray's report to Plaintiff's attorney.

After a hearing, the worker's compensation magistrate, in his 32-page opinion, found that Petitioner had suffered a work-related injury, but that the disability had terminated by the time of his examination by Respondent Dr. Ray. In the opinion, the worker's compensation magistrate provided several reasons for preferring Dr. Ray's opinion over the opinion of Plaintiff's physician, Dr. Smith. First, unlike Dr. Smith, an internist, Dr. Ray is "a board-certified physical medicine and rehabilitation specialist, precisely the specialty in medicine that does diagnose and treat such injuries," *i.e.*, the injuries at issue in this case. Second, Dr. Smith's testimony "failed to give a logical reason for his switching diagnoses (from 'herniated disc' to 'thoracic strain' to 'lumbago,' then back to 'herniated disc')." Third, Dr. Smith "arbitrarily changed the long-standing restrictions he had previously placed upon Plaintiff (of a 40 lb. lifting limit) to a 15 lb. limit without any explanation in the testimony or justification in his notes."

The decision of the magistrate was affirmed by the Worker's Compensation Appellate Commission. Under

Michigan law, a further appeal to the Michigan Court of Appeals was permitted by leave, and thereafter to the Michigan Supreme Court by leave. Petitioner did not seek leave to appeal.

Plaintiff filed this RICO action before the worker's compensation magistrate had issued his opinion. At the hearing on the motions to dismiss, Petitioner conceded that Michigan Tooling Association Service Company was no longer in existence as of January 1, 2003 and that its claim administration functions had been assumed by Respondent Michigan Tooling Association Workers' Compensation Fund.

The district court granted Respondents' motions to dismiss and Petitioner appealed to the Sixth Circuit. The Sixth Circuit affirmed dismissal of the RICO claim. It reversed the district court's dismissal with prejudice of the pendent claim for intentional infliction of emotional distress and remanded for dismissal without prejudice.

The Sixth Circuit ruled that Petitioner had not established the required element of continuity because the decision of the Bureau "is binding on all parties and, if favorable to Moon, would prevent the Defendants from withdrawing the benefits in the absence of further action by the Bureau." 465 F.3d at 727.

After the district court dismissed Petitioner's claims, Defendants moved for the imposition of sanctions under 28 U.S.C. § 1927. The motion was referred to the magistrate judge, who granted the motion and awarded costs. Plaintiff appealed the award of costs to the district court and that issue has not yet been resolved.

REASONS FOR DENYING THE PETITION

I. THERE CAN BE NO PATTERN OF RACKETEERING WHERE THE CLAIM FOR WORKER'S COMPENSATION BENEFITS IS SUBJECT TO FINAL ADJUDICATION BY THE STATE AGENCY EMPOWERED TO RESOLVE DISPUTES CONCERNING ENTITLEMENT TO BENEFITS.

To establish a claim under RICO, 18 U.S.C. § 1961 *et seq.*, a plaintiff must establish that the defendant engaged in (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. "Racketeering activity" is defined to include several predicate acts, one of which is mail fraud. 18 U.S.C. § 1961(1)(b). The pattern of activity must consist of at least two acts within a 10 year period. 18 U.S.C. § 1961(5).

In this case, even if it is assumed that Petitioner has actually alleged acts of fraud, the required pattern of racketeering is missing because the facts do not demonstrate the required continuity.

Petitioner argues that he demonstrated both open and closed-ended continuity, and that the definition of closed-ended continuity requires further development by this Court. Even if such development were needed, this case does not provide a vehicle for such development. The alleged fraudulent acts in this case occurred entirely within a state court adjudicative proceeding and therefore, as is discussed below, applying RICO would violate the principles of the *Burford* abstention doctrine (part II, below), especially where

the acts alleged to be fraud are in fact merely the assertion of a disputed position, and the offering of evidence to support that position (part III).

As the Sixth Circuit observed, the fact that the alleged predicate acts in this case all took place within a single transaction – the dispute over Petitioner's entitlement to continued worker's compensation benefits – by itself prevents any form of continuity, either open or closed-ended. All of the alleged predicate acts could lead only to a final resolution in the state Bureau's hearing and appellate levels and, if Petitioner had chosen to appeal, in the state courts.

Petitioner argues, however, that the Sixth Circuit ignored certain parts of his complaint, which he says allege continuity by suggesting that Defendants may have committed similar acts as to other unnamed employees, *i.e.*, disputing entitlement to benefits and obtaining evidence to support their assertion. Specifically, Petitioner states at page 15 that "[t]he Court of Appeals ignored the allegations of paragraphs 9f, 15 and 16 of the First Amended Complaint that *other claimants* had been defrauded . . . ." (italics in original).

Petitioner misstates the facts. The opinion below quotes text from paragraph 9f and from paragraph 15. 465 F.3d at 727. Having quoted the language that Petitioner claimed the court ignored, the Sixth Circuit went on to analyze whether it met the test of continuity. The opinion discusses this Court's opinion in *H.J., Inc. v. Northwestern Bell Telephone Company,* 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). *H.J., Inc.* states that "the threat of continuity may be established by showing that the predicate acts or offenses are part of an entity's regular way of doing business." *Id.*, 242 U.S. at 242.

If that test is applied to the allegations of Petitioner's complaint, they fall short of alleging any facts that establish continuity. In Paragraph 9f, Petitioner alleged that "defendants and their attorney had relied on [Dr. Ray] in the past to issue 'cut off' reports." This is nowhere near an allegation that using Dr. Ray to issue "cut off" reports was a regular part of the business of any of the Defendants. It is merely an allegation – and a conclusory one at that – about alleged past events, with no allegation of quantity or frequency sufficient to permit an inference that this was a "regular way of doing business." *H.J., Inc.* at 242.

The same is true of paragraph 15, where Petitioner alleged that "[o]n information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their worker's compensation benefits." This allegation, also conclusory and unsupported by any concrete factual allegations, is also at best a statement that something similar may have occurred one or more times in the past. Petitioner did not allege that this was a regular way of doing business, nor did he allege facts that would support such an inference.

II. BECAUSE PROCEEDINGS UNDER MICHIGAN'S WORKER'S DISABILITY COMPENSATION ACT ARE JUDICIAL IN NATURE, AND INCLUDE APPEALS TO THE CIVIL COURTS FROM THE AGENCY DECISION, ABSTENTION UNDER *BURFORD* IS REQUIRED.

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), this Court adopted a policy of deference to state adjudicative processes. In *Burford*, that agency was the Texas Railroad Commission. This Court said:

> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 333-334, 63 S.Ct. at 1107 (citation omitted).

Michigan's worker's compensation scheme has a similar judicial component. The process itself at the trial level, is conducted before and resolved by the magistrate. From the magistrate's decision, an appeal of right can be taken to the Worker's Compensation Appellate Commission. Mich. Comp. Laws 418.859a.

Allowing any RICO claim to be raised where it relates to a state administrative proceeding would inevitably be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." This is the point the trial court made in its amended opinion and order (pp. 11-12), in reference to the *Burford* doctrine, when it stated:

> Indeed, the frequent resolution, in a federal forum, of a plaintiff's entitlement to worker's

> compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCA.

In part, this springs from the inherent uncertainty that would arise in any WDCA proceeding if the parties and the agency knew that there was a parallel action proceeding in federal court. One result in the federal action would make the WDCA proceeding pointless, while the other would allow it some vitality.

On a more practical level, there is also the fact that the remedies are inconsistent. RICO provides for a single, lump-sum damage award, which is to be trebled. This is fundamentally inconsistent both with the mechanism and the purpose of the worker's compensation scheme. Worker compensation is built upon the premise that the mechanism of compensation is to be periodic payments to replace wage loss. A lump sum award, whether trebled or not, is inconsistent with that purpose. The mechanism reflects the fundamental purpose of the compensation scheme, which is compensation for wage loss, not punishment for wrongdoing.

This case presents a textbook example of why *Burford* should be respected and applied. Here, the State agency that had *exclusive* jurisdiction to resolve such questions determined that Petitioner was not disabled subsequent to April 8, 2004. That decision was appealed as of right and affirmed by the Worker's Compensation Appellate Commission. Petitioner could have sought leave to appeal to the Michigan Court of Appeals, and thereafter to the Michigan Supreme Court, but chose not to do so. The determination is final under State law. Petitioner now asks

that this Court permit the application of RICO to overrule that final disposition. If this were permitted, the Michigan worker's compensation system would be reduce to a shambles. Every case lost in that forum would then be subject to federal court RICO scrutiny on the unsupported and oxymoronic allegation that a witness gave a "fraudulent opinion," and that this violated RICO because the opinion, as required by State law, was mailed.

These inconsistencies would lead to a severe disruption in the state proceedings. A WDCA magistrate faced with a parallel federal proceeding might be tempted to consider whether to proceed, on the premise that his or her decision might ultimately be valid, or defer to the federal court, so as to learn whether the efforts would be wasted. That at least would be a sensible approach, but the entire worker's compensation scheme is built on procedures that compel the handling of claims so that benefits are made available on a timely basis. A WDCA magistrate does not have the discretion to hold a proceeding in abeyance.

III. PLAINTIFF HAS NOT ALLEGED PREDICATE ACTS OF FRAUD.

To meet the requirement of a predicate act, Plaintiff relies on allegations of fraud. Plaintiff alleges five fraudulent acts. Three of them consist of the mailing by the Fund of a "Notice of Dispute," which, under the provisions of the WDCA, raised the issue whether Plaintiff continued to be disabled, required that he be examined by Dr. Ray, and led to the proceeding before the Worker's Compensation Agency magistrate. Another is the mailing by Dr. Ray of his report of his physical examination of Plaintiff. The fifth allegation

of fraud is the mailing of Dr. Ray's report by Defendant's attorney.

The first three allegations of fraud are merely allegations that the Defendants followed the procedures specified in the WDCA for raising and resolving a disputed issue of fact. Where there is a dispute over the worker's entitlement to continuing benefits, it is to be determined by the bureau. "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau . . . ." Mich. Comp. Laws 418.841(1). Disputes must be submitted in writing: "[U]pon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing . . . ." Mich. Comp. Laws 418.847(1).

The fourth and fifth allegations are the mailing of a medical opinion. Fraud requires a statement of fact, not an expression of an opinion. In a RICO case, the plaintiff must plead "a material *misrepresentation of fact* that was calculated or intended to deceive persons of reasonable prudence and comprehension." *VanDenBroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (emphasis added). Plaintiff's claim of fraud is based on the opinion of Dr. Ray, which Plaintiff asserts is "fraudulent." At the hearing on the motions to dismiss, Plaintiff's counsel asserted that "[t]he fraudulent statement is the *opinion* that plaintiff is able to work." (emphasis added). It is oxymoronic to speak of a fraudulent opinion.

Dr. Ray's report consists of five pages of factual detail, after which the doctor states his medical opinion. To show fraud, the Plaintiff would have to show that Dr. Ray

knowingly misstated a *fact* within his report. For example, Dr. Ray's report summarizes the findings of a previous MRI. If Dr. Ray had intentionally misstated the results of that MRI, or denied its existence, or invented another report and used that misstatement of *fact* as the basis for an opinion, then a claim of fraud might be stated. But Plaintiff makes no such claim. It is Dr. Ray's medical opinion that Plaintiff describes as fraudulent, not the statements of fact on which that medical opinion is based.

Pursuant to Rule 15.2, the following misstatements of fact in the petition must be addressed. At page 16, Petitioner states that he "was not permitted . . . discover[y]" on the issue of fraud. "He cannot subpoena records .. . He cannot take depositions." The WDCA states that the Bureau "shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute." Mich. Comp. Laws 418.853. Michigan's Supreme Court has held that the Bureau's power "is broad enough to require the answering of interrogatories," *Boggetta v. Burroughs Corporation,* 368 Mich. 600, 603, 118 N.W.2d 980, 981-982 (1962). Petitioner quotes (petition p. 16) a sentence fragment from *Stokes v. DaimlerChrysler,* __ Mich. App. __, __ N.W.2d __ (2006) to the effect that discovery in worker's compensation cases is not derived from the same source as discovery in the trial courts. That is correct, but in that opinion, Michigan's Court of Appeals also noted that the statutes "gave the worker's compensation magistrate power to grant discovery when necessary," and the Court of Appeals further noted that the Michigan Supreme Court, when it considered an application for leave in *Stokes,* had stated that '*Boggetta* . . . . 'remains controlling authority.'" *Stokes v. DaimlerChrysler,* 475 Mich. 875, 714 N.W.2d 347 (2006).

Moreover, in this case plaintiff deposed Dr. Ray and questioned him at length concerning his alleged financial bias, which Petitioner claims is the factual support for the allegedly "fraudulent opinion." There is no mechanism available to Petitioner in a RICO claim that is not provided under state law and process.

Petitioner argues that he was entitled to the application of a "relaxed" standard to his fraud allegations, so that he might show that the same "fraudulent opinions" were given by Dr. Ray or others "to defraud other persons of their worker's compensation benefits (petition, p. 21). This is incorrect for three reasons.

First, Petitioner's allegations of fraud in this case fall short of any actionable standard, and making the same allegations for other claimants does not bring about a qualitative change.

Second, in this case Petitioner deposed Dr. Ray extensively about his alleged financial bias arising from his work in other cases, but Petitioner did not use any of that information to plead fraud with particularity or to establish an alleged pattern; Petitioner's proffered proofs were still conclusory and limited to this case.

Third, Petitioner has always had the ability simply to canvass his colleagues to gather information about other allegedly fraudulent opinions by Dr. Ray. At the hearing in the trial court, he claimed to have this information, but declined to disclose it. Counsel for Petitioner there stated: "I don't want to name names, but other highly respected plaintiff attorneys in the work comp business have said, yes,

this is a cut off doctor who is notorious for writing these reports." (Motion hearing transcript p. 9).

In this case, as in any dispute over a worker's physical condition, different physicians performed examinations and/or read reports and reached different conclusions as to Plaintiff's medical condition. Dr. Ray was one of six physicians (two for the plaintiff and four for the defendants) whose evidence the worker's compensation magistrate considered, along with sworn deposition testimony. There is, in short, nothing at all that distinguishes this case from any other worker's compensation dispute over a worker's physical condition.

The award of sanctions in the district court by the magistrate under 28 U.S.C. § 1927 is a reflection of the fact that this case is actually a "strike suit," in which a litigant who has lost a decision in a state court invokes RICO as a means of retaliation against the opposing party for offering evidence which the RICO plaintiff did not like, and a means of retaliation against the witness for offering an unfavorable opinion. An inherent part of the judicial process is the offering of conflicting opinions. Allowing a RICO case to proceed by labeling as "fraud" both the assertion of a claim cognizable under state law (that Petitioner's disability had ended) and the offering of evidence to support that claim, does violence both to the purposes of RICO and to state adjudicative proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RONALD G. ACHO
CUMMINGS, MCCLOREY,
DAVIS & ACHO, P.C.
Attorneys for Harrison Piping Supply
33900 Schoolcraft Road
Livonia, MI 48150
(734) 261-2400

HAL O. CARROLL*
VANDEVEER GARZIA, P.C.
Attorney for Michigan Tooling Association Service Company and Michigan Tooling Association Workers' Compensation Fund
1450 W. Long Lake Road
Suite 100
Troy, MI 48098
(248) 312-2800

DALE A. ROBINSON
DAVID M. THOMAS
RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.
Attorneys for Dr. Asit Ray
4000 Penobscot Building
645 Griswold Street
Detroit, MI 48226
(313) 065-6100

C. F. BOYLE, JR.
LAW OFFICE OF C. F. BOYLE, JR.
Attorney for Michigan Tooling Association Workers' Compensation Fund
1313 North Ritchie Court
Suite 1702
Chicago, IL 60610
(312) 440-1240

Counsel for Respondents

* *Counsel of Record*